

No. ①
90-492

Supreme Court, U.S.

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ROBERT E. SPANGLER, JR.

In The
Supreme Court of the United States

October Term, 1990

WISCONSIN EDUCATION ASSOCIATION COUNCIL
and WEAC-PAC,

Petitioners,

vs.

THE WISCONSIN STATE ELECTIONS BOARD,
PETER DOHR, FREDERIC MOHS, DON MOECKER,
THOMAS GODAR, MARK SOSTARICH, ROBERT
TURNER, JOHN NIEBLER, EVAN ZEPPUS,
KEVIN KENNEDY and THEIR OFFICERS,
AGENTS, SERVANTS and EMPLOYEES,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

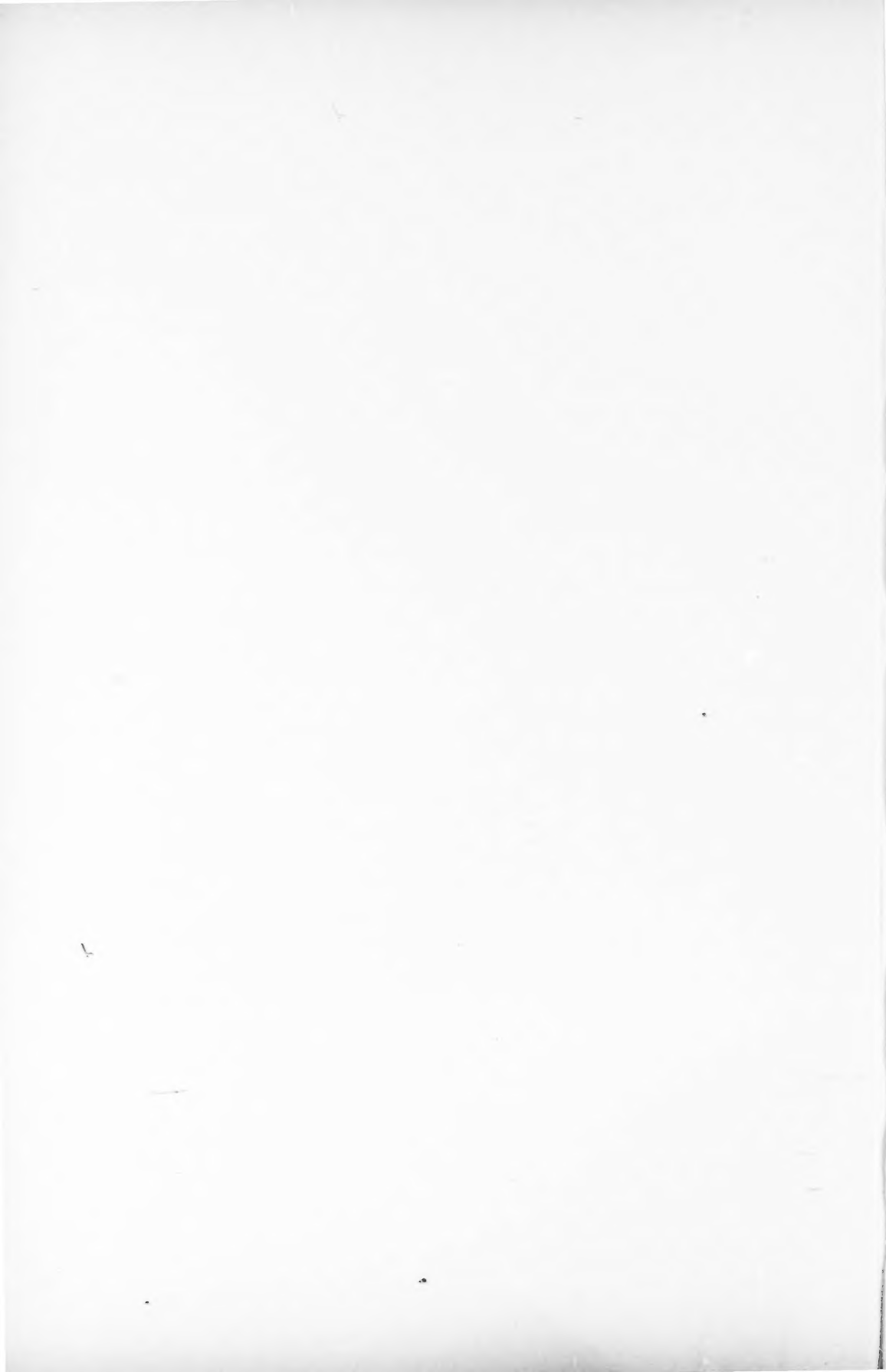
PETITION FOR A WRIT OF CERTIORARI AND
APPENDIX TO PETITION

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September, 1990



QUESTIONS PRESENTED

Section 11.29(1), Wis. Stats., exempts from the contribution limitations of the Wisconsin Campaign Financing Laws expenses incurred by an association for the purpose of communicating only with its members, provided the communications are made "with respect to endorsements of candidates . . . or explanation of [the association's] needs or interests. . . ." Refusing to interpret this exemption broadly to be consistent with its federal constitutional history, the Wisconsin Supreme Court held that the costs of some exclusively intra-associational political communications are "contributions" within the meaning of the Wisconsin laws. As a result, intra-associational political communications can be restricted by state law contribution limitations. The Wisconsin Supreme Court held that the content of internal political communications determines whether expenses incurred in connection with such communications are regulated by the state.

Accordingly, the questions presented for review are:

1. Do the speech and association guarantees of the First and Fourteenth Amendments to the United States Constitution permit a state to limit political communications by an association to its members? See *United States v. C.I.O.*, 335 U.S. 106 (1948).

QUESTIONS PRESENTED - continued

2. Because the Wisconsin Supreme Court did not define the meaning of the "with respect to endorsements of candidates . . . or explanation of its views or interests" language of § 11.29, are the Wisconsin Campaign Financing Laws as applied to intra-associational communications unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution because they "fail[] to clearly mark the boundary between permissible and impermissible speech"? *See Buckley v. Valeo*, 424 U.S. 1, 41 (1976).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW.....	2
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED	3
STATEMENT OF THE CASE.....	3
REASONS FOR GRANTING THE WRIT	7
I. BY LIMITING PROTECTION FOR POLITICAL COMMUNICATIONS AMONG WEAC MEM- BERS, THE DECISION OF THE WISCONSIN SUPREME COURT AND THE ACTIONS OF THE WISCONSIN STATE ELECTIONS BOARD DEPRIVE WEAC AND ITS MEMBERS OF LONGSTANDING SPEECH AND ASSOCIA- TIONAL RIGHTS GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.....	7
II. BECAUSE THE WISCONSIN SUPREME COURT DID NOT DEFINE THE MEANING OF THE "WITH RESPECT TO ENDORSEMENTS OF CANDIDATES . . . OR EXPLANATION OF ITS VIEWS OR INTERESTS" LANGUAGE OF § 11.29, THE WISCONSIN CAMPAIGN FINANCING LAWS AS APPLIED TO INTRA- ASSOCIATIONAL COMMUNICATIONS ARE UNCONSTITUTIONALLY VAGUE IN VIOLA- TION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SINCE THEY "FAIL [] TO CLEARLY MARK THE BOUNDARY BETWEEN PERMISSIBLE AND IMPERMISSIBLE SPEECH."	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES CITED

<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	8, 11, 12
<i>Citizens Against Rent Control v. Berkeley</i> , 454 U.S. 290 (1981)	8
<i>FEC v. Massachusetts Citizens for Life</i> , 479 U.S. 238 (1986)	10
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958)	7
<i>Pipefitters v. United States</i> , 407 U.S. 385 (1972)	10
<i>United States v. Automobile Workers</i> , 352 U.S. 567 (1957)	9
<i>United States v. C.I.O.</i> , 335 U.S. 106 (1948)	9

CONSTITUTIONAL PROVISIONS CITED

U.S. Const. amend. I	3, 6, 7, 11, 14
U.S. Const. amend. XIV § 1	3, 7, 12, 14

FEDERAL STATUTES CITED

2 U.S.C. § 441b(b)(2)(A)	10
28 U.S.C. § 1257(a)	2
42 U.S.C. § 1983	5

STATE STATUTES CITED

Wis. Stat. § 11.29(1) (1987-88)	3, 4, 5, 6, 12, 13
Wis. Stat. § 11.01(6)(a) (1987-88)	3
Wis. Stat. §§ 11.26(2)(b) and (c) (1987-88)	3, 8

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KEVIN KENNEDY and THEIR OFFICERS,
AGENTS, SERVANTS and EMPLOYEES,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin**

**PETITION FOR A WRIT OF CERTIORARI-AND
APPENDIX TO PETITION**

The petitioners, Wisconsin Education Association Council and WEAC-PAC, respectfully pray that a writ of certiorari issue to review the decision of the Supreme Court of Wisconsin rendered on June 28, 1990.

OPINIONS BELOW

The decision and order of the Supreme Court of Wisconsin is reported at 156 Wis. 2d 151, 456 N.W.2d 839 (1990). It is printed in the Appendix (App. 1-14).

The decision and order of the Court of Appeals of Wisconsin, District IV, is unreported. It is printed in the Appendix (App. 15-18).

The decision and order of the Circuit Court of Dane County is unreported. It is printed in the Appendix (App. 19-28).

The decision of the State Elections Board is printed in the Appendix (App. 29-32).

JURISDICTION

Petitioners seek review of a decision and order of the Wisconsin Supreme Court entered on June 28, 1990. That order affirmed an August 21, 1989 decision and order of the Wisconsin Court of Appeals, which in turn had vacated a February 27, 1989 decision and order of the Circuit Court of Dane County.

Pursuant to 28 U.S.C. § 1257(a), the Court has jurisdiction to review the decision and order of the Wisconsin Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I
U.S. Const. amend. XIV § 1

STATUTES

Wis. Stat. § 11.29(1) (1987-88)
Wis. Stat. § 11.01(6)(a) (1987-88)
Wis. Stat. §§ 11.26(2)(b) and (c) (1987-88)

The constitutional and statutory provisions involved are set forth verbatim in the Appendix (App. 112-114).

STATEMENT OF THE CASE

In May, 1988, the Wisconsin Education Association Council ("WEAC"), a union, announced that it would pay union members (called "interns") to mobilize the union's membership in support of endorsed candidates for the Wisconsin Legislature. In connection with the announcement, WEAC promulgated a job description (App. 57-59) and, shortly thereafter, implemented the program.

News of WEAC's program troubled some partisan members of the Wisconsin State Elections Board ("the Board"). *Sua sponte*, the Board placed consideration of the program on a meeting agenda. The Board's executive director, who is the chief election officer of Wisconsin, informed Board members that the staff "had some initial concerns" about the program. The Board summoned a WEAC representative to the meeting to address those "concerns" (App. 40).

Following the meeting, the Board wrote WEAC that it was not pursuing the matter at that time because there were no allegations that WEAC had acted inconsistently with the Wisconsin Campaign Financing Laws ("the Campaign Laws"). The Board attached a warning to WEAC that certain intra-associational intern activities would constitute contributions within the meaning of the Campaign Laws if undertaken after contact with candidates or their representatives ("candidates"). The warning forced WEAC to conclude it could not proceed with the program as contemplated because there was a substantial risk the Board would charge WEAC with violating the reporting and contribution provisions of the Campaign Laws. Accordingly, WEAC instructed its interns to refrain from interacting with candidates (App. 41, 63-64).

Shortly thereafter, the Board's executive director and its legal counsel informed WEAC's counsel that certain expenses incurred for purposes of communicating exclusively with other WEAC members would be contributions within the meaning of the Campaign Laws (App. 42-44). The Board's staff rejected WEAC's contentions that § 11.29(1), Wis. Stats., demonstrated a clear legislative intent to exempt such intra-associational communications from all the provisions of the Campaign Laws¹ and

¹ Section 11.29(1), Wis. Stats., provides as follows:

Nothing in this chapter restricts any corporation, cooperative or voluntary association other than a political party or personal campaign committee from making disbursements for the purpose of communicating only with its members, shareholders or subscribers to the exclusion of all other persons, with

(Continued on following page)

that expenses incurred in connection with exclusively intra-associational communications are protected by the First and Fourteenth Amendments to the United States Constitution (App. 42-44).

WEAC thereupon instituted an action in state court under 42 U.S.C. § 1983 and state law, asserting in the complaint (App. 47-48, 66-71), *inter alia*, these federal constitutional claims. The circuit court dismissed WEAC's complaint without deciding these federal constitutional claims, concluding that the action was "premature" because WEAC had failed to request a formal opinion from the Board (App. 66-71).

Heeding the circuit court's admonition, WEAC filed a request for a formal opinion. The Board opined that the exemption contained in § 11.29(1) depended on the content of each political communication (App. 29-32, 77-79).

WEAC instituted this action under 42 U.S.C. § 1983 and state law, seeking in the complaint a declaration that, pursuant to § 11.29(1) as well as these federal constitutional guarantees, expenses incurred by an association for political communications to its members are not contributions and cannot be limited (App. 33, 50-54). The circuit court dismissed the complaint without addressing the constitutional challenges (App. 19-28). WEAC then

(Continued from previous page)

respect to endorsements of candidates, positions on a referendum or explanation of its views or interests, without reporting such activity. No such corporation, cooperative or voluntary association may solicit contributions from persons who are not members, shareholders or subscribers to be used for such purposes (App. 114).

brought these constitutional claims to the Wisconsin Court of Appeals by timely filing a Notice of Appeal and an appellate brief. The Wisconsin Court of Appeals concluded that the case was moot. It vacated the decision of the circuit court and remanded the case with directions to dismiss the action (App. 15-18).

The Wisconsin Supreme Court granted review. WEAC, in its brief, urged the Wisconsin Supreme Court (as it had urged both the lower court and the Board) to interpret § 11.29 to exempt all intra-associational political communications from the Campaign Laws, which would have avoided these federal constitutional claims. WEAC also specifically raised these federal constitutional claims. 156 Wis. 2d at 161, 456 N.W.2d at 844 (App. 10-11).

In a split decision, the Wisconsin Supreme Court rejected WEAC's interpretation of § 11.29 by adopting the interpretation of the Board, holding that the application of the exemption depends upon the "nature and scope" of the intra-associational political communications. 156 Wis. 2d at 162, 456 N.W.2d at 844 (App. 11). The majority held that the federal constitutional claims could not be decided unless WEAC specified the actual words of the proposed intra-associational communications.

Justice Bablitch, in dissent, agreed with WEAC's interpretation of § 11.29. He also noted that a decision on these federal constitutional claims did not require specific examples of the actual words of the intra-associational political communications because *all* intra-associational communications are protected by the First Amendment. He concluded that the majority's interpretation of § 11.29 rendered the statute unconstitutionally vague:

WEAC is now caught between Scylla and Char-
 ybdis. They can forego political activity which
 they believe is constitutionally protected, or
 they can proceed with their plans at their peril.
 In order to find out what the law means, they
 must proceed, but proceed with the knowledge
 they may be either breaking the law or coming
 perilously close to doing so.

156 Wis. 2d at 164, 456 N.W.2d at 845 (App. 14).

REASONS FOR GRANTING THE WRIT

I. BY LIMITING PROTECTION FOR POLITICAL COMMUNICATIONS AMONG WEAC MEMBERS, THE DECISION OF THE WISCONSIN SUPREME COURT AND THE ACTIONS OF THE WISCONSIN STATE ELECTIONS BOARD DEPRIVE WEAC AND ITS MEMBERS OF LONGSTANDING SPEECH AND ASSOCIATIONAL RIGHTS GUARANTEED BY THE FIRST AND FOURTEENTH AMEND- MENTS TO THE UNITED STATES CONSTITU- TION.

The Wisconsin Supreme Court has concluded that political communications by an association to its members may be limited because expenses incurred for such communications can be contributions within the meaning of the Campaign Laws. Such a conclusion is inconsistent with speech and associational rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

It is a fundamental principle of federal constitutional law that political communications from a membership organization to its members are vigorously protected. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460

(1958) ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.") See also *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981) ("[T]he practice of persons sharing common views banning together to achieve a common end is deeply embedded in the American political process. . . . Its value is that by collective effort individuals can make their views known, when counted individually, their voices would be faint or lost."); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political speech.")

The decisions of the Wisconsin Supreme Court and the Board violate these fundamental federal constitutional rights. Indeed, if these opinions are permitted to stand, the members of every voluntary association in Wisconsin will be unable to converse effectively within their own association about many of the very issues that brought them together in the first place. As the Wisconsin Supreme Court and the Board construe the Campaign Laws, WEAC would quickly arrive at the legal maximum it could "contribute."² At that point WEAC's paid personnel would be prohibited from urging other WEAC members to support endorsed candidates.

This interpretation is inconsistent with longstanding decisions of the Court and with a comparable exemption contained in the Federal Elections Campaign Act

² The limitations are \$1,000 per state senate race and \$500 per assembly race. §§ 11.26(2)(b) and (c), Wis. Stats. (App. 113-114).

("FECA"), which the Court has stated is a codification of federal constitutional law.

In *United States v. C.I.O.*, 335 U.S. 106 (1948), the Court interpreted a provision of the Labor-Management Relations Act of 1947 ("LMRA") that appeared to prohibit labor organizations from making expenditures in connection with any federal election. An endorsement urging the members' support of a congressional candidate was disseminated to the C.I.O. membership. The government contended that, because the endorsement had been made in a union newsletter involving the expenditure of union funds, the activity violated LMRA. All nine justices concluded that the indictment could not stand. The majority observed:

If [Section 304 of the LMRA] were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interest from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

335 U.S. at 121.

In *United States v. Automobile Workers*, 352 U.S. 567 (1957), the Court held that the constitutional protections announced in *C.I.O.* do not apply to communications beyond the membership. In distinguishing these communications from communications to members, the Court reinforced the holding in *C.I.O.* that intra-associational communications, such as the ones WEAC seeks to have with its members, are constitutionally protected.

In 1971, Congress enacted FECA, and in so doing codified the constitutional law set forth above. FECA expressly exempts expenses incurred in connection with "communications by a corporation to its stockholders . . . and their families or by a labor organization to its members . . . *on any subject.*" (Emphasis supplied). 2 U.S.C. § 441b(b)(2)(A).

Shortly after enactment of FECA, the Court confirmed that the new federal statute codified the long-standing political rights of voluntary associations to communicate with their members. The Court relied on Representative Hansen, the sponsor of the relevant provision of FECA:

[T]he purpose of his proposal was . . . "to codify the court decisions interpreting [and the legislative history explicating] section 610 [the modern counterpart to § 304 of the LMRA] . . . and to spell out in more detail what a labor union or corporation can or cannot do in connection with a Federal election."

Pipefitters v. United States, 407 U.S. 385, 410-11 (1972). See also *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 248 (1986).

These cases and their FECA codification demonstrate that exclusively internal political communications of associations cannot be limited by government and are entitled to protection under the speech and associational guarantees of the United States Constitution. By refusing to provide this protection to all intra-associational political communications, the Wisconsin Supreme Court committed federal constitutional error.

- II. BECAUSE THE WISCONSIN SUPREME COURT DID NOT DEFINE THE MEANING OF THE "WITH RESPECT TO ENDORSEMENTS OF CANDIDATES . . . OR EXPLANATION OF ITS VIEWS OR INTERESTS" LANGUAGE OF § 11.29, THE WISCONSIN CAMPAIGN FINANCING LAWS AS APPLIED TO INTRA-ASSOCIATIONAL COMMUNICATIONS ARE UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SINCE THEY "FAIL[] TO CLEARLY MARK THE BOUNDARY BETWEEN PERMISSIBLE AND IMPERMISSIBLE SPEECH."

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court construed the following provision of FECA:

No person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or the defeat of such candidate, exceeds \$1,000.

Id. at 39. Appellants in *Buckley* contended that the provision was unconstitutionally vague because the phrase "relative to a clearly identified candidate" failed to provide adequate notice as to what kind of speech was subject to the provision's limitations. Acknowledging that the vagueness challenge must be given careful scrutiny where legislation "imposes criminal penalties in an area permeated by First Amendment interests," *see id.* at 40-41, the Court observed that the statute contained no definition clarifying what expenditures were "relative to" a candidate:

The use of so indefinite a phrase as "relative to" a candidate fails to clearly mark the boundary

between permissible and impermissible speech, unless other portions of [the provision] make sufficiently explicit the range of expenditures covered by the limitation.

Id. at 41-42.

The Court concluded that the provision was unconstitutionally vague unless the "constitutional deficiencies" could be avoided by judicially construing the provision's meaning. *Id.* at 42-43. The Court then proceeded to construe the provision narrowly, holding that it is limited to explicit words of advocacy of election or defeat of a candidate. *See* 424 U.S. at 42-43.

Section 11.29 poses the identical vagueness problem. As noted above, § 11.29 exempts from the Campaign Laws expenses incurred by a voluntary association "for the purpose of communicating only with its members . . . *with respect to* endorsements of candidates . . . or explanation of its views or interests. . . ." (emphasis supplied) The "with respect to" language of § 11.29 is as unclear as the "relative to" phrase in FECA. Moreover, as was true in *Buckley* regarding the "relative to" clause, the Wisconsin Legislature did not define the phrase "with respect to." The Campaign Laws also contain criminal sanctions. § 11.61, Wis. Stats.

To resolve the vagueness problem, WEAC urged the Wisconsin Supreme Court to construe the exemption to be consistent with its legislative history and the substantive federal constitutional law set forth in § I, *supra*. The Wisconsin Supreme Court refused. Indeed, the Wisconsin Supreme Court did not further construe the § 11.29 exemption at all. The Wisconsin Supreme Court held, as did the Board, that whether the intra-associational speech

was exempt could only be determined by analyzing the content of the communications on a case-by-case basis. According to the Wisconsin Supreme Court, WEAC must specify precisely the "nature and scope of the communications which will occur between its members and the interns" to determine whether the § 11.29 exemption applies. 156 Wis. 2d at 162, 456 N.W. 2d at 844 (App. 11). Accordingly, voluntary associations in Wisconsin are left with a vagueness problem of an extraordinary magnitude. As Justice Bablitch observed in dissent, the action of the Wisconsin Supreme Court leaves WEAC "caught between Scylla and Charybdis. They can forego political activity which they believe is constitutionally protected, or they can proceed with their plans at their peril." 156 Wis. 2d at 164, 456 N.W.2d at 845 (App. 14).

The Wisconsin Supreme Court has essentially held that the words and phrases of § 11.29 are not susceptible to any further definition under Wisconsin law. Therefore, like the "relative to" phrase of FECA before the Court issued its narrowing construction in *Buckley*, the "with respect to" phrase of § 11.29 "fails to clearly mark the boundary between permissible and impermissible speech." See 424 U.S. at 41. Voluntary associations such as WEAC have absolutely no idea how to confine their internal political speech to lawful parameters, because § 11.29 gives them no idea which internal communications are communications "with respect to . . . endorsements of candidates . . . or explanation of its views or interests" and which are not.

In short, because the Wisconsin Supreme Court did nothing to alleviate the inherent vagueness problem with § 11.29, Wisconsin associations and their members are left

with a statutory scheme that is unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision and opinion of the Supreme Court of Wisconsin.

Respectfully submitted,

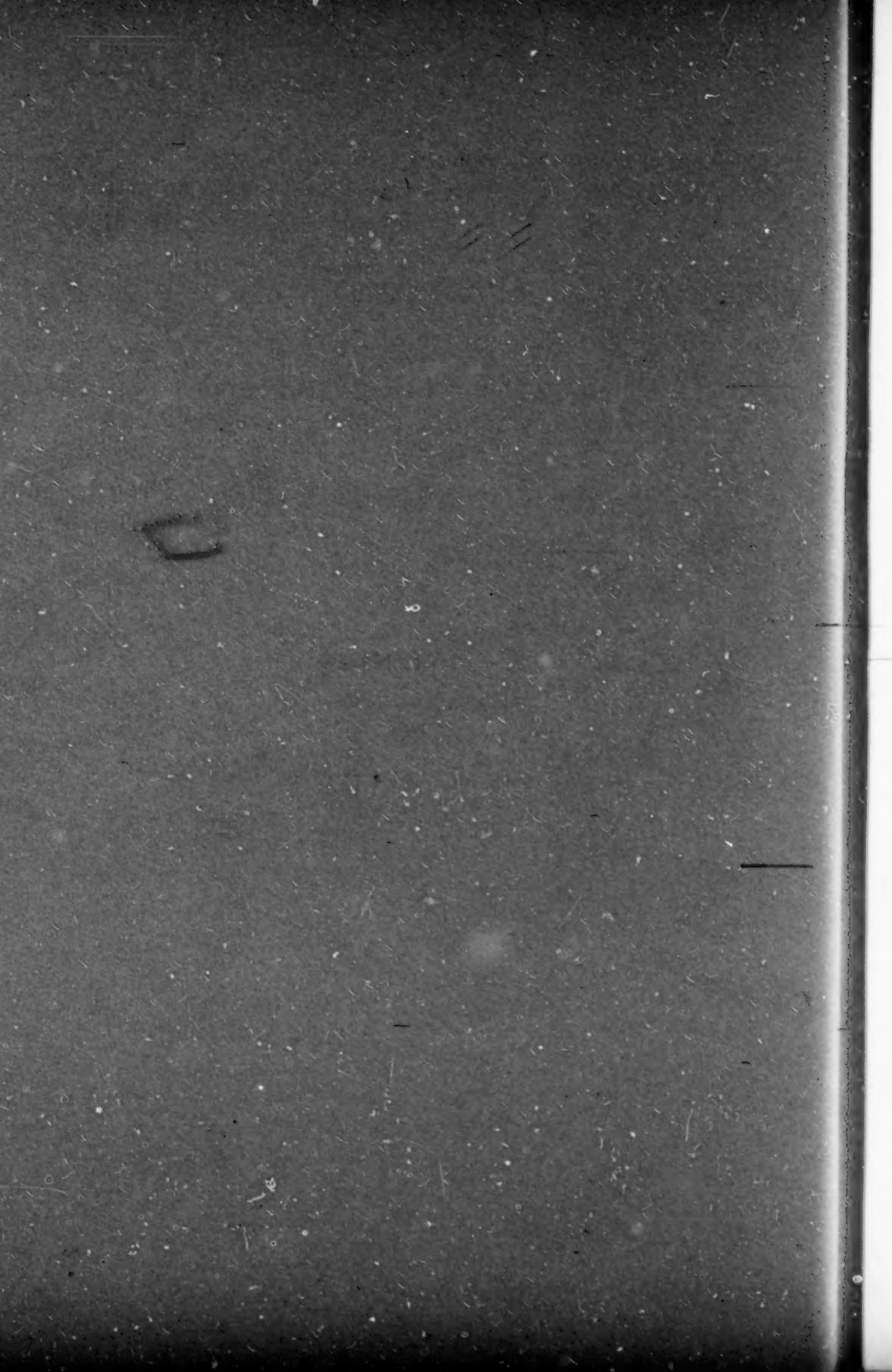
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September, 1990

APPENDIX



APPENDIX

TABLE OF CONTENTS

	Page
A. Decision of Supreme Court of Wisconsin filed June 28, 1990.....App.	1
B. Decision of Court of Appeals of Wisconsin of August 21, 1989.....App.	15
C. Decision of the Circuit Court of Dane County.....App.	19
D. Decision of Wisconsin State Elections Board dated October 18, 1988.....App.	29
E. Amended Complaint and Exhibits dated October 19, 1988.....App.	33
F. "Questions Presented" section of Petitioner's Brief to Wisconsin Supreme Court.....App.	108
G. "Questions Presented" section of Petitioner's Brief to Wisconsin Court of Appeals.....App.	111
H. Constitutional Provisions and Statutes Involved section.....App.	112



App. 1

No. 89-0551

STATE OF WISCONSIN : IN SUPREME COURT

WISCONSIN EDUCATION ASSOCIATION COUNCIL
and WEAC-PAC,

Plaintiffs-Appellants-Petitioners,

v.

THE WISCONSIN STATE ELECTIONS BOARD, PETER
DOHR, FREDERIC MOHS, DON MOECKER, THOMAS
GODAR, MARK SOSTARICH, ROBERT TURNER, JOHN
NIEBLER, EVAN ZEPPUS, KEVIN KENNEDY, and Their
Officers, Agents, Servants and Employees,

Defendants-Respondents.

Filed JUN 28 1990

REVIEW of a decision of the Court of Appeals.
Affirmed.

LOUIS J. CECI, J. This case is before the court on review of an unpublished opinion and order of the court of appeals, dated August 21, 1989, which dismissed as moot an appeal from a final order of the circuit court for Dane County, James C. Boll, Circuit Judge. The petitioners, Wisconsin Education Association Council (WEAC) and its political action committee (WEAC-PAC), commenced an action seeking a declaratory judgment that sec. 11.29(1), Stats., exempts from the disclosure requirements and contribution limitations of ch. 11, Stats., all expenses incurred by the association in communicating with its members about political matters, even if those expenses are incurred at the request or suggestion of a candidate or his or her campaign committee. In the alternative, the petitioners sought a declaration that if

App. 2

sec. 11.29(1) were administered and enforced to regulate communication among its members, the statute, as applied, would be unconstitutionally vague and would deprive its members of their rights to free speech and association guaranteed by the federal and state constitutions.

The circuit court concluded that the exemption contained in sec. 11.29(1), Stats., was limited by the plain language of the statute. The circuit court ruled, in essence, that disbursements made in connection with the political communications of a voluntary association may be subject to disclosure and limitation under ch. 11, Stats., when those communications are prompted by the request or suggestion of a candidate and are in the nature of a contribution to the candidate's campaign. The circuit court refused to address the petitioners' constitutional challenges to the statute as applied on the ground that those issues were not ripe for determination. On appeal, the court of appeals determined that the issues in this case had become moot and dismissed the appeal. Although we affirm the court of appeals' decision to dismiss this case, we do so on the ground that the circuit court did not abuse its discretion in concluding that the case was not ripe for determination.

The facts of this case follow. WEAC is a voluntary association of teachers, administrators, and other employees of educational systems throughout Wisconsin. WEAC-PAC is a committee of WEAC which engages in political activities to further the objectives of the association.¹ In May of 1988, WEAC announced that it intended

¹ Both WEAC and WEAC-PAC will be referred to collectively in this decision as WEAC.

App. 3

to hire interns from among its members to work to mobilize the membership in support of those candidates whom WEAC planned to endorse in the upcoming November elections. WEAC also announced that each intern would be paid a salary of \$7,500 and would work full time during the summer and part time during the school year until the November elections.

WEAC eventually hired twenty interns to work in the program and created a job description for the interns. The job description stated, among other things, that the interns would be required to: 1) contact members concerning the placement of yard signs; 2) prepare materials and find volunteers for legislative drops; 3) organize a "get out and vote" effort among WEAC members for the primary and general elections; 4) organize and supervise direct mail projects to members of the association; 5) develop a list of the community activities in which members should participate to advocate the election of endorsed candidates; 6) inform WEAC members of the dates on which candidates would be appearing in their localities; 7) organize and supervise telephone banks to call members; and 8) perform other duties and activities as assigned.

After learning of the intern program, members of the State Elections Board (the Board)² became concerned that expenses incurred by WEAC in connection with certain intern activities might constitute campaign contributions and cause WEAC to be in violation of the contribution

² Under sec. 5.05(1), Stats., the Board is charged with the duty of administering ch. 11, Stats., and other laws relating to elections and election campaigns.

App. 4

limitations of \$1,000 per senate race and \$500 per assembly race set forth in secs. 11.26(2)(b) and (c), Stats. In particular, the Board members were of the opinion that certain activities, if undertaken by the interns at the request or suggestion of a candidate or his or her campaign committee, might constitute contributions to that candidate. As a result of its concerns, the Board met with the legislative director of WEAC on July 25, 1988, to discuss the operation of the intern program. By letter dated August 2, 1988, the Board informed WEAC that it planned to take no formal action with respect to the intern program because there was no evidence that WEAC had acted inconsistently with the campaign financing laws.

On September 7, 1988, WEAC commenced a circuit court action seeking a declaratory judgment that sec. 11.29(1), Stats., exempted from the reporting requirements and contribution limitations of ch. 11 any expense incurred by WEAC interns in communicating with WEAC members about political matters, even if those expenses were incurred as a result of contact with an endorsed candidate or his or her campaign committee. In the alternative, WEAC sought a declaration that if the Board administered and enforced sec. 11.29(1) to regulate political communication among WEAC's members, the statute, as applied, would violate its members' rights to free speech and association and would be unconstitutionally vague. The circuit court dismissed the complaint without prejudice, concluding that the action had been commenced prematurely because WEAC had failed to first

App. 5

obtain a formal opinion from the Board pursuant to sec. 5.05(6), Stats.³

Thereafter, WEAC filed a request for a formal opinion with the Board. On October 18, 1988, the Board issued an opinion which stated that the operation of the exemption contained in sec. 11.29(1), Stats., is not dependent on whether a communication is initiated at the request or suggestion of a candidate, but rather on the nature of the communication to the membership. The opinion advised that the sec. 11.29(1) exemption is limited to communications which 1) emanate from the organization to its membership to the exclusion of all others; 2) concern the endorsements of candidates, positions on a referendum or an explanation of the organization's views or interests; and 3) are paid for by the organization. The opinion stated that if an organization communicates with its members in cooperation or consultation with, in concert with, or at the request or suggestion of a candidate, that communication must be limited to informing the membership of the organization's endorsement of the candidate or of the organization's views and interests in relation to the candidate to fall within the statutory exemption. The opinion finally stated that because WEAC did not describe the nature of the communications which its interns would undertake, the Board was unable to

³ On September 28, 1988, WEAC appealed to the court of appeals and filed a motion to accelerate the appeal. On October 7, 1988, the court of appeals denied the motion to accelerate the appeal and on January 4, 1989, the court of appeals dismissed the appeal as moot because WEAC had since commenced another action in circuit court involving the identical issues and parties.

App. 6

determine whether expenses incurred in connection with those communications would be exempt from disclosure and limitation under sec. 11.29(1).

On October 14, 1988, WEAC commenced a second circuit court action requesting the same declaratory relief that it had requested in the previous circuit court action. The circuit court dismissed the case on February 27, 1989. The circuit court ruled that the plain language of sec. 11.29(1), Stats., limited the types of communications which are exempted from disclosure and limitation under ch. 11 and refused WEAC's invitation to edit those limitations from the face of the statute. With respect to WEAC's constitutional claims, the circuit court observed that sec. 11.29(1) had never been applied to WEAC in the sense that no complaint had been filed against WEAC with the Board. The circuit court ruled that it was not sufficiently apprised of WEAC's position in relation to the campaign financing laws to determine whether any portion of sec. 11.29(1) would be unconstitutional as applied to its members.

WEAC appealed the circuit court's dismissal to the court of appeals. On August 21, 1989, the court of appeals dismissed the appeal as moot because the intern program had ceased operation after the elections in November of 1988. WEAC petitioned this court for review of the court of appeals' dismissal and filed a motion to supplement the record with an affidavit reflecting its intention to continue the intern program in the future. We granted the petition and the motion. As previously stated, we affirm the court of appeals' decision to dismiss the case, but on

the ground that the circuit court did not abuse its discretion in concluding that the case was not ripe for determination.

The first issue presented in this case concerns the construction of sec. 11.29(1), Stats., which exempts from the reporting requirements and contribution limitations of ch. 11 expenses incurred in connection with the political communications of corporations, cooperatives, and voluntary associations under certain circumstances. The interpretation of a statute is a question of law, which this court decides independently and without deference to the decisions of the lower courts. *Sacotte v. Ideal-Werk Krug & Priester*, 121 Wis. 2d 401, 405, 359 N.W.2d 393 (1984). Section 11.29(1) provides in relevant part:

Nothing in this chapter restricts any . . . voluntary association . . . from making disbursements for the purpose of communicating only with its members . . . to the exclusion of all other persons, with respect to endorsements of candidates, positions on a referendum or explanation of its views or interests, without reporting such activity. No such . . . voluntary association may solicit contributions from persons who are not members . . . to be used for such purposes.

The Board interprets sec. 11.29(1), Stats., to exempt from disclosure and limitation under ch. 11 any expense incurred by a voluntary association in communicating its political views or interests exclusively to its members. Under the Board's construction of the statute, a communication will be insulated from governmental regulation if the communication (1) emanates from the organization

to its membership to the exclusion of all others; (2) consists of endorsements of candidates, positions on a referendum or an explanation of the organization's views or interests; and (3) is paid for by the organization. According to the Board, the question of whether a particular communication is protected by the statute is dependent on its nature and scope. If a communication is made in cooperation with, in concert with, or at the request or suggestion of a candidate and is not restricted to the membership, the communication will generally be treated as a contribution and will be subject to disclosure and limitation under ch. 11.

WEAC argues that the Board's definition of the types of political communication protected by sec. 11.29(1), Stats., is too restrictive. In WEAC's view, the statute exempts from disclosure and limitation any expense incurred in connection with any communication between a WEAC intern and WEAC members, regardless of whether the communication is prompted by the request or suggestion of a candidate and regardless of whether that communication ultimately goes beyond the membership to the general public. WEAC's position is essentially that as long as some communication of a political nature occurs among its members at some point in the chain of events, that communication immunizes the entire transaction from regulation as a contribution under the provisions of ch. 11. We reject WEAC's construction of sec. 11.29(1) as contrary to the plain language of the statute and to the declared purpose of ch. 11.

Chapter 11, Stats., seeks to protect the integrity of the elections process by requiring full disclosure of all contributions and disbursements made on behalf of every

App. 9

candidate for public office and by placing reasonable limitations on such activities. *See* sec. 11.001. To this end, corporations, cooperatives, and unregistered organizations are prohibited from directly engaging in activity of a political nature. However, an organization may establish a separate political committee which utilizes segregated funds for the purpose of supporting or opposing any candidate for political office. Section 11.38(1)(a). A political committee is required to report contributions and disbursements which it makes on a periodic basis and is subject to the limitations on candidate contributions set forth in ch. 11. *See* secs. 11.06(1) and (7) and sec. 11.26(2). Expenses incurred by a political committee in cooperation or consultation with, in concert with, or at the request or suggestion of a candidate are generally treated as candidate contributions under Wisconsin law. *See* sec. 11.06(7m).

Section 11.29(1), Stats., provides an exemption from the disclosure requirements and contribution limitations of ch. 11 when an organization incurs expenses in connection with certain political communications. WEAC asks this court to declare that the sec. 11.29(1) exemption is without limitation. Such a declaration, however, would require this court to erase from the face of the statute that language which states that the exemption is limited to disbursements made for the purpose of "communicating only with [the organization's] members . . . to the exclusion of all other persons" with respect to the "endorsements of candidates . . . or [an] explanation of [the organization's] views or interests." The plain language of sec. 11.29(1) compels the conclusion that disbursements made in connection with political communications which

exceed the scope of the statute are subject to disclosure and limitation under ch. 11. To hold otherwise would allow WEAC and other similarly situated organizations to evade the requirements and limitations of ch. 11 by simply structuring their political contributions to coincide with some incidental communication among members.

We next turn to WEAC's alternative argument that the circuit court erred in refusing to issue a declaratory judgment holding the statute unconstitutional as applied to its members. The decision to grant or deny relief in a declaratory judgment action is a matter within the sound discretion of the circuit court. *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 668, 239 N.W.2d 313 (1976). In order for declaratory relief to obtain, there must be a justiciable controversy which (1) involves a claim of right on the part of the plaintiff which is asserted against one who has an interest in contesting it; (2) is between two persons whose interests are adverse; (3) involves a legally protectible interest in the person seeking declaratory relief; and (4) is ripe for judicial determination. *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982); *Lister v. Board of Regents*, 72 Wis. 2d 282, 306, 240 N.W.2d 610 (1976).

WEAC argued to the circuit court that administration and enforcement of the Board's narrow interpretation of sec. 11.29(1), Stats., would deprive its members of their rights to free speech and association guaranteed by the federal and state constitutions. WEAC argued, in addition, that administration and enforcement of the Board's interpretation of the statute would render sec. 11.29(1) unconstitutionally vague because it would fail to give

WEAC members sufficient notice of the types of communications exempted by the statute. The circuit court observed that the statute had never been applied to WEAC and refused to issue declaratory relief on the ground that the court was not adequately apprised of WEAC's status in relation to the campaign financing laws to decide if sec. 11.29(1) would be unconstitutionally applied to WEAC.

Our review of the record persuades us that the circuit court reasonably concluded that the instant controversy was sufficiently contingent and uncertain so as to preclude declaratory relief. Throughout this litigation, WEAC has refused to specify the nature and scope of the communications which will occur between its members and the interns. Such refusal prevented the Board from issuing an opinion indicating whether expenses incurred in connection with the communications would be exempt from disclosure and limitation under ch. 11, Stats. The circuit court properly observed that to resolve WEAC's constitutional claims would require the court to speculate both on the nature of WEAC's conduct and on the enforcement posture of the Board with respect to that conduct. As presently situated, there is no actual controversy between the Board and WEAC nor any indication that a controversy is likely to arise in the future. On these facts, we agree that the issues are not sufficiently crystallized to allow a court to decide whether the statute would be unconstitutionally applied to WEAC. We find no abuse of discretion.

By the Court. – The opinion and order of the court of appeals is affirmed.

STATE OF WISCONSIN : IN SUPREME COURT

No. 89-0551

Wisconsin Education Association Council, and WEAC-PAC,

Plaintiffs-Appellants-Petitioners,

v.

The Wisconsin State Elections Board, Peter, Dohr, Frederic Mohs, Don Moecker, Thomas Godar, Mark Sostarich, Robert Turner, John Niebler, Evan Zeppos, Kevin Kennedy, and Their Officers, Agents, Servants and Employees,

Defendants-Respondents.

Filed JUN 28 1990

WILLIAM A. BABLITCH, J. (dissenting). The two issues can be simply stated: 1) Are political intra-associational communications "contributions" to the candidate within the meaning Wisconsin's Campaign Finance Law if the communications are prompted by a candidate or candidate's campaign committee? 2) If so, is such law constitutional?

I.

As best I can discern, the majority opinion holds that "disbursements made in connection with political communications which exceed the scope of the statute are subject to disclosure and limitation under ch. 11." Slip op. at 12. There can, of course, be no argument with that conclusion. The problem, unless I'm missing something, is that this conclusion begs the question. The question

presented by WEAC is whether any intra-associational disbursements, if prompted by a candidate or a candidate's organization, "exceed the scope" of the statute. WEAC wants, and deserves, an answer to that question. The answer of the majority seems to be "maybe."

I conclude, based on the legislative history, the clear and unambiguous language of sec. 11.29(1), Stats., and the constitutional implications if interpreted otherwise, that expenses incurred by a voluntary association in communicating exclusively with its members about political matters, regardless of the impetus of such communication, need not be reported and are not contributions within the meaning of ch. 11.

II.

I cannot comprehend how the majority can conclude that we do not have sufficient facts to resolve the second issue, the constitutional question presented. The majority says, in essence, that they need to know the nature of the intra-associational communication before they can issue an opinion on the statute's constitutionality. WEAC claims that *any* intra-associational political communication is constitutionally protected, regardless of source or impetus. We do not need to know the nature of the communication to answer that issue as presented by WEAC. *Any* political communication, WEAC says, is protected. Thus, any example of a political intra-associational communication we could surmise, without limitation, is covered by WEAC's argument. What more could we possibly need to answer the constitutional question presented?

WEAC is now left in an untenable position because of the majority's failure to adequately answer the first issue, and their failure to answer at all the second. Is *any* political intra-associational expenditure prompted by a candidate or a candidate's organization a contribution? If it depends upon the "nature" of it, what communications are included and what are not? Does the nature of the communication depend upon the type of expenditure? Or does it depend upon the type of prompt? If so, what "type" of expenditure, what "type" of prompt?

WEAC is now caught between Scylla and Charybdis. They can forego political activity which they believe is constitutionally protected, or they can proceed with their plans at their peril. In order to find out what the law means, they must proceed, but proceed with the knowledge they may be either breaking the law or coming perilously close to doing so. I dissent.

App. 15

DISTRICT IV
Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, August 21, 1989

To: Caren B. Goldberg	Alan Lee
Charles D. Clausen	Asst. Attorney General
Peter K. Rofes	
Robert H. Friebert	Clerk of Courts
330 E. Kilbourn, #1250	City County Building
Milwaukee, WI 53202	
	Hon. James C. Boll
	City County building

You are hereby notified that the Court entered the following opinion and order:

89-0551 WEAC and WEAC-PAC v. The Wisconsin State
Elections Board, et al.

Before Eich, C.J., Dykman and Sundby, JJ.

Respondents The State Elections Board, et al., move to dismiss the appeal on the ground that it is moot. Alternatively they move for summary affirmance. Appellants Wisconsin Education Association Council (WEAC) and WEAC-PAC oppose both motions.

Respondents claim the appeal is moot since the intern program which was the subject of the litigation ended on election day, November 8, 1988. They further assert that it is pure speculation to suggest that the issue will recur since it is impossible to determine whether

appellants will have another intern program or whether any future intern program would be similar to the intern program which ended in November, 1988. Appellants argue that respondents should have filed a cross-appeal seeking to modify the trial court decision such that it would have granted respondents' trial court motion to dismiss the action as moot. We disagree. We may determine mootness *de novo*.

Alternatively, appellants argue that respondents should have moved the trial court to vacate its decision and order on the grounds that the action had become moot. Again, we disagree. Respondents did move the trial court to dismiss the action for mootness. The trial court did not rule on that motion. Appellants cite no authority which requires one to move to vacate a favorable judgment on a ground previously raised but ignored in reaching the final judgment.

Appellants note that federal courts will vacate a trial court judgment if an appeal is moot since otherwise that judgment would have *res judicata* effect without appellants having the opportunity to challenge it. See *United States v. Munsingwear*, 340 U.S. 36 (1950). We disagree that *Munsingwear* precludes a determination of mootness unless the party asserting mootness has moved the trial court to vacate the judgment. In *Munsingwear*, the United States was faulted for not moving to vacate the judgment in a previous appeal and acquiescing in that appeal being dismissed for mootness. *Id.* at 40. If anything, *Munsingwear* can be read to mean that the party who lost in the lower court should move to vacate a judgment if the appeal is moot. Appellants have not explicitly so moved,

but we will construe their response to make such a motion and will grant it.

Finally, appellants claim the motion to dismiss for mootness is untimely since the notice of appeal was filed March 17 but respondents waited several months to move to dismiss. They cite no authority which precludes a finding of mootness if a motion to dismiss is not made by a certain time. If the appeal is moot, we will dismiss it.

Appellants contend that the appeal is not moot since the intern program is not the only subject of the litigation. Rather, they contend the litigation is about "the communications that a union is permitted to disseminate to its members without the specter of Big Brother intruding." We disagree. The thrust of the complaint as well as the trial court's decision is whether the elections laws require certain activities of the interns to be reported. While the general principles that may be drawn from a decision in this case could be applied in the future to other fact situations, this case is about the intern program which ended in November, 1988. Appellants do not suggest that WEAC intends to continue the same intern program in the future.

Appellants argue that if the appeal is moot, we should hear it nevertheless under the exception to the mootness doctrine for questions of public interest. In an earlier appeal involving the same parties, we stated that we disagreed with appellants' contention that the action involved questions of substantial public interest. We abide by that statement.

We agree that the appeal is moot. Given this disposition, we need not decide the motion for summary affirmance.

IT IS ORDERED the trial court's decision is vacated and the matter is remanded with directions to dismiss the action.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN CIRCUIT COURT BR 6
DANE COUNTY

WISCONSIN EDUCATION
ASSOCIATION COUNSEL and
WEAC-PAC,

Petitioners,

vs.

THE WISCONSIN STATE ELECTIONS
BOARD, PETER DOHR, FREDERIC
MOHS, DON MOECKER, THOMAS
GODAR, MARK SOSTARICH,
ROBERT TURNER, JOHN
NIEBLER, EVAN ZEPPUS,
KEVIN KENNEDY And Their Officers,
Agents, Servants and Employees,

Respondents.

DECISION
Case No.
88 CV 5600

A motion for injunctive and declaratory relief has been brought by plaintiff, Wisconsin Education Association Council and WEAC-PAC. For the reasons contained herein, the Court denies plaintiffs' motion and grants defendants' Motion to Dismiss.

STATEMENT OF CASE

WEAC is a voluntary association of teachers, administrators and other employees of educational systems throughout Wisconsin. WEAC's principal purpose is to represent the interests of its members.

WEAC-PAC is a committee of WEAC whose principal purpose is to engage in political activities that further the educational objectives of WEAC. Among the activities in

which WEAC-PAC engages is supporting candidates for political office. WEAC-PAC is also a "committee" within the meaning of Sec. 11.01, Wis. Stats.

Defendants in this action are the Wisconsin State Elections Board and its members. The Board is responsible for the enforcement and administration of the laws governing state elections within Wisconsin. Defendant Kevin Kennedy, the executive director of the Board, is the chief election officer for the State of Wisconsin.

In May, 1988, WEAC announced that it was seeking to hire approximately twenty interns to work between June and November of 1988 to mobilize the membership in support of candidates for the Wisconsin Senate and Assembly that WEAC had endorsed or would be endorsing. Each intern hired would receive a salary of seven thousand five hundred dollars and would be reimbursed for travel expenses. The announcement stated that WEAC members would be given priority for the intern positions. (Plaintiffs' Amended Complaint, Exh. A.)

Also in May, 1988, WEAC created a job description for the position of intern. As provided in the job description, the responsibilities of the position included the following: a) contacting members for placement of yard signs; b) preparing materials and finding volunteers for legislative drops; c) securing and dividing community and legislative district maps into workable sections; d) developing sign-up sheets, voluntary time sheets, and volunteer kits; e) organizing and implementing an internal voter identification and registration plan; f) organizing a "get out the vote" effort among the WEAC members in the primary and general elections; g) recruiting WEAC

members to be poll watchers; h) identifying members by the Assembly District in which they live; i) surveying members on their attitude to the WEAC endorsed candidates; j) compiling a list of phone numbers of the membership; k) organizing and supervising direct mail projects to the membership; l) developing a list of community activities where the members should participate and advocate the election of endorsed candidates; m) informing the membership when candidates will be in their locality; n) assisting in research projects in targeting and past voter statistics of the membership; o) organizing and supervising telephone banks to call members; and p) performing other duties and activities as assigned. (Plaintiffs' Amended Complaint, Exh. B.)

The job description stated that the interns would work under the direct supervision of one of the Political Action Consultants or one of the staff of the WEAC Government Relations Division. Finally, the job description stated that the intern would work solely with WEAC members except where the WEAC made independent expenditures. (Plaintiffs' Amended Complaint, Exh. B.)

Pursuant to the job description, the responsibilities of the intern would necessarily require frequent and substantial contact with WEAC members and at least occasional contact with endorsed candidates and their organizations. Prior to July 25, 1988, the interns were hired and commenced work pursuant to the job description.

Although the Board had received no complaints regarding WEAC's intern program, board member Thomas Godar requested that consideration of the intern

program be placed on the agenda for the Board meeting scheduled for July 25.

On July 22, Mr. Kennedy prepared and distributed to all Board members a memorandum wherein Mr. Kennedy addressed the concerns of some Board members over the intern program. In general, the memo questioned whether the paid interns contact with candidates was consistent with independent activity. (Plaintiffs' Amended Complaint, Exh. D.)

On July 25, Michael Brennan, legislative director of WEAC, appeared before the Board to discuss the intern program.

Four days later, Mr. Brennan sent a memorandum to the WEAC interns in which he stated that "[t]he purpose of this memo is to once again restate that you are not to have any direct communication with anyone involved in a legislative campaign, an incumbent legislator or an individual running for office." (Plaintiffs' Amended Complaint, Exh. E.)

By letter from Mr. Kennedy dated August 2, 1988, the Board informed WEAC that the Board had taken no action on the matter "[b]ecause there were no allegations that [WEAC] has acted inconsistent with the law." (Plaintiffs' Amended Complaint, Exh. F.) Along with the letter Mr. Kennedy enclosed a copy of his July 22 memorandum.

On August 17, 1988, counsel for plaintiffs met with Mr. Kennedy and two other members of the Board's staff to again discuss plaintiffs' intern program. Mr. Kennedy expressed the opinion that communications between an

intern and WEAC member were not exempt from reporting and contribution provisions if the communications were the result of candidate contact.

On September 7, 1988, plaintiffs instituted an action in the Circuit Court for Dane County against the Board and its members seeking, inter alia, a declaratory judgment similar to that requested here. An Amended Complaint included Mr. Kennedy as a defendant.

On September 20, 1988, the Honorable Moria Krueger issued a memorandum decision and order dismissing the Amended Complaint without prejudice. The Court noted that the responsibility of interpreting the election laws belonged to the Board, not to the executive director and individual Board members. The court concluded that plaintiffs had failed to exhaust their administrative remedies because they had not requested a formal opinion from the Board pursuant to Sec. 5.05(6), Wis. Stats. (Plaintiffs' Amended Complaint, Exh. G.)

On September 28, 1988, plaintiffs appealed the dismissal to the Court of Appeals, District IV, filing a motion to accelerate the appeal as well. On October 7, 1988, the Court of Appeals issued an order denying plaintiffs' motion stating that "with the election occurring on November 8, 1988, the Court concludes that insufficient time remains prior to the election to allow meaningful briefing by the parties and an adequate time for an opinion to be issued by this Court. In addition, action by the Elections Board could very well moot this appeal." (Plaintiffs' Amended Complaint, Exh. H.)

By a letter to Mr. Kennedy dated September 26, 1988, plaintiffs filed a request for a formal opinion with the

Board pursuant to Sec. 5.05(6). (Plaintiffs' Amended Complaint, Exh. I.)

On October 5, 1988, the Board held a hearing at which counsel for plaintiffs discussed the intern program with the Board. At that hearing, a motion to issue no opinion failed to carry by a vote of three to three. Similarly, a subsequent motion to issue a formal opinion consistent with the plaintiffs' position likewise failed by a tie vote. Accordingly, the Board failed to take any action on the intern matter at the October 5 meeting. (Plaintiffs' Amended Complaint, Exh. K.)

On October 12, 1988, the Board again gathered with counsel for the plaintiffs to discuss the intern program. The Board once again failed to decide whether to issue a formal opinion.

On October 14, 1988, plaintiffs filed this action. At that time they requested a hearing on a motion for a temporary injunction. A hearing on the motion was held on October 18, 1988, at which time this Court declined to issue the injunction on the grounds that the paucity of facts were such that the Court could not conclude that the plaintiffs enjoyed a reasonable likelihood of success on the merits.

Finally, on October 18, 1988, the Board again met and by a four to three vote adopted the recommendation of Mr. Kennedy. (Plaintiffs' Amended Complaint, Exh. J, pp. 60, 61.)

DECLARATORY JUDGMENT

Granting or denying relief in a declaratory judgment action is a matter within the sound discretion of the Court. *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 668, 239 N.W.2d 313 (1976).

For declaratory relief to be obtained, there must be a "justiciable" controversy, that is to say: (1) a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, i.e. a legally protectible [sic] interest; and (4) the issue must be ripe for judicial determination. *Loy v. Bunderson*, 107 Wis.2d 400, 410, 320 N.W.2d 175 (1982).

DECISION

Plaintiffs seek a declaration by this Court to the effect that:

"pursuant to Section 11.29, Wis. Stats., plaintiffs need not report as contributions within the meaning of Wisconsin Campaign financing laws, ch. 11, Wis. Stats., expenses incurred for any communication from a WEAC intern intended exclusively for WEAC members, even when such communications are made, directly or indirectly, in concert with or at the direction or suggestion of a candidate or candidate's campaign committee."

Section 11.29(1), Wis. Stats., states:

s. 11.29. Communications for political purposes

(1) Nothing in this chapter restricts any corporation, cooperative or voluntary association other than a political party or personal campaign committee from making disbursements for the purpose of communicating only with its members, shareholders or subscribers to the exclusion of all other persons, with respect to endorsements of candidates, position on a referendum or explanation of its views or interests, without reporting such activity. No such corporation, cooperative or voluntary association may solicit contributions from persons who are not members, shareholders or subscribers to be used for such purposes.

Any analysis of statutory construction must begin with the language of the statute itself. *State ex rel. Melen-towich v. Klink*, 108 Wis.2d 374, 379, 321 N.W.2d 272 (1982).

It is a basic rule of statutory construction that in construing statutes effect should be given to each and every word, clause and sentence, and construction that would result in any portion of a statute being superfluous should be avoided. *County of Columbia v. Bylewski*, 94 Wis.2d 153, 164, 288 N.W.2d 129 (1980); *State ex rel. Briggs & Stratton Corp. v. Noll*, 100 Wis.2d 650, 655, 302 N.W.2d 487 (1981).

Basic rules of statutory construction illustrate that the declaration the plaintiffs seek cannot issue. To place upon sec. 11.29(1) the construction urged by the plaintiffs would be tantamount to judicial legislation. Plaintiffs would have this Court edit from the text of the statute the

words "with respect to endorsements of candidates, position on a referendum or explanation of its views or interests," rendering the same surplusage.

It is clear from the face of the statute that the above quoted portions of sec. 11.29(1) are meant to limit the reporting exemption contained therein. This being so, the construction advanced by the plaintiffs is unreasonable.

Next, plaintiffs maintain that to the extent sec. 11.29(1) regulates communications from WEAC interns to WEAC members it is unconstitutionally vague. In this regard it is important to note that plaintiffs constitutional challenge is aimed at the statute's application to them.

Defendants are correct in stating that sec. 11.29 has never been applied to plaintiffs in the sense that no complaint has been filed against plaintiffs with the Board. While that fact alone does not prevent a court from granting relief, it is but one reason for not addressing plaintiffs constitutional challenge.

Simply stated, this Court does not believe it has been adequately informed of plaintiffs status, in relation to the Wisconsin election laws, to determine whether or not any portion thereof is unconstitutional as applied to plaintiffs. The extent of this Court's knowledge of WEAC-PAC is that it is a "committee" as defined in Sec. 11.01, Wis. Stats. In all other respects, for all that appears in the record, plaintiffs are a nonentity in the eyes of Wisconsin's election laws.

This Court will not address a constitutional attack and embark on a constitutional analysis when it cannot

App. 28

result in a determination of how any such finding would impact on plaintiffs.

Defendants' motion to dismiss is granted.

Dated this 27 day of February, 1989.

BY THE COURT

/s/ James C. Boll
JAMES C. BOLL
Circuit Judge

cc: Atty. Robert H. Friebert
Asst. Atty. Gen. Alan Lee

App. 29

(picture) State of Wisconsin/ELECTIONS BOARD

132 EAST WILSON STREET
THIRD FLOOR
MADISON, WISCONSIN 53702
(608) 266-8005

Kevin J. Kennedy
Executive Director

October 18, 1988

EVAN N. ZEPPUS
CHAIRMAN

Mr. Robert H. Friebert
Friebert, Finerty & St. John, S.C.
Attorneys at Law
Two Plaza East, Suite 1250
330 E. Kilbourn Ave.
Milwaukee, WI 53202-3145

Mr. Brandon Scholz, Executive Director
Republican Party of Wisconsin
P.O. Box 31
Madison, WI 53701

Op.El.Bd. 88-4

Dear Mr. Friebert and Mr. Scholz:

You have requested the Elections Board to issue a formal opinion under the provisions of s.5.05(6), Stats., relating to the application of s.11.29(1), Stats., to communications by an organization to its membership at the request or suggestion of a candidate. Your opinion request does not describe the nature of the request or suggestion by the candidate to the organization. More importantly your request does not describe the nature of the communication to be made to the membership by the organization.

Wisconsin law clearly permits any organization to make communications to its membership. Communications of a

political nature which consists of endorsements of candidates, positions on a referendum or an explanation of the organization's views or interests are not subject to the registration and reporting requirements of Chapter 11, Stats. This is provided that the communications are funded solely by the organization and the communications are limited to the members of the organization to the exclusion of all others. Section 11.29(1), Stats.

Communications of a political nature which go beyond the scope articulated in s.11.29(1), stats., would be subject to the registration and reporting requirements of Chapter 11. If the political communications are done in cooperation or consultation with, in concert with, or at the request or suggestion of a candidate, the communications will be subject to the contribution limits of Chapter 11. The communications must be restricted to the membership to the exclusion of all others or be subject to applicable contribution limits under the requirements of Chapter 11, Stats.

Communications beyond the exclusions articulated in s.11.29(1), Stats., which are done independently of the candidate would be subject to the registration and reporting requirements set out in ss.11.05, 11.06(1)(j), (7), 11.12(6), Stats. Of course, communications to members which do not meet the political purpose test under the provisions of s.11.01(16), Stats., are not subject to regulation, including the exclusion set out in s.11.29(1), Stats.

Wisconsin law prohibits corporations and cooperatives and unregistered organizations from engaging in political activity. s.11.38(2), Stats. The exclusions of s.11.29(1), Stats., provide an exemption from those requirements.

The exclusion from disclosure of communications with respect to endorsements and an explanation of the organization's views or interests is designed to permit otherwise political communications by an organization because it does not reach out to the general public. Although the communications may be designed to influence voting, or even expressly advocate the election or defeat of clearly identified candidates, the communications are not subject to disclosure because the audience and the activity are restricted.

If a candidate requests the organization to communicate to its membership, the organization may inform its membership of candidate endorsements and an explanation of its views or interests. The views and interests of the candidate do not qualify for the exclusion from disclosure except to the extent that the organization utilizes them in its explanation of its views and interests. To the extent that communication of the candidate's views and interests go beyond the statutory exclusion they are subject to disclosure and limitation under the applicable provisions of Chapter 11, Stats.

The exclusion from registration and reporting is dependent on three factors:

1. The communication emanates from the organization to its membership to the exclusion of all others;
2. The communication consists of endorsements of candidates, positions on a referendum or an explanation of the organizations views or interests;
3. The communication is paid for by the organization.

Activity which does not meet this criteria does not qualify for the exclusion from registration, reporting and contribution limits established in Chapter 11, Stats. The application of other provisions of the statutes depend on the nature of the activity involved.

STATE ELECTIONS BOARD

/s/ Evan N. Zeppos
Evan N. Zeppos
Chairman

ENZ:KJK:cj

CAPTION: The exclusion set out in s.11.29(1), Stats., and the application of Wisconsin's campaign finance disclosure law is limited to communications from an organization to its members to the exclusion of all others for the purpose of communicating endorsements of candidates, positions on referenda or an explanation of the organization's views and interests. The funding of such communications must be paid for by the organization.

STATE OF WISCONSIN :
CIRCUIT COURT :

DANE COUNTY
CIVIL DIVISION

WISCONSIN EDUCATION
ASSOCIATION COUNCIL
and WEAC-PAC,

Plaintiffs,

Case No.
88-CV-5600

vs.

THE WISCONSIN STATE
ELECTIONS BOARD,
PETER DOHR, FREDERIC MOHS,
DON MOECKER,
THOMAS GODAR, MARK
SOSTARICH,
ROBERT TURNER, JOHN NIEBLER,
EVAN ZEPPUS, KEVIN KENNEDY,
And Their Officers, Agents,
Servants, and Employees,

Defendants.

AMENDED COMPLAINT

**NATURE OF THE ACTION,
JURISDICTION AND VENUE**

1. This is an action for declaratory and injunctive relief and arises out of the campaign financing provisions of the Wisconsin Statutes, Chapter 11; Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983; the First and Fourteenth Amendments to the Constitution of

the United States; and Article I, Section 3 of the Wisconsin Constitution.

2. The jurisdiction of this court is conferred by Article 7, Section 8 of the Wisconsin Constitution, Const. Art. VII, § 8, and by the Wisconsin Declaratory Judgments Act, § 806.04, Wis. Stats. Pursuant to Sections 806.04(11) and 813.025 of the Wisconsin Statutes, §§ 806.04(11) and 813.025, this Complaint and all motions filed herewith have been filed with notice to the attorney general.

3. Venue is founded in this court pursuant to § 801.50(9), Wis. Stats., because this is an action against a state board and state officers and employees acting in their official capacities.

THE PARTIES

4. Plaintiff Wisconsin Education Association Council ("WEAC") is a voluntary association of teachers, administrators, and other employees of educational systems throughout the State of Wisconsin. WEAC's principal purpose is to represent the interests of its members.

5. Plaintiff WEAC-PAC is a committee of WEAC whose principal purpose is to engage in political activities that further the educational objectives of WEAC. Among the activities in which WEAC-PAC engages is supporting candidates for political office. WEAC-PAC is also a "committee" within the meaning of § 11.01, Wis. Stats.

6. Defendant Wisconsin State Elections Board ("the Board") is an administrative agency of the State of Wisconsin. The Board is responsible for the enforcement and

administration of the laws governing state elections within Wisconsin.

7. Peter Dohr is a member of the Wisconsin State Elections Board. In his capacity as a member of the Board, defendant Dohr participates in the enforcement and administration of the laws governing state elections within Wisconsin.

8. Frederic Mohs is a member of the Wisconsin State Elections Board. In his capacity as a member of the Board, defendant Mohs participates in the enforcement and administration of the laws governing state elections within Wisconsin.

9. Don Moecker is a member of the Wisconsin State Elections Board. In his capacity as a member of the Board, defendant Moecker participates in the enforcement and administration of the laws governing state elections within Wisconsin.

10. Thomas Godar is a member of the Wisconsin State Elections Board. In his capacity as a member of the Board, defendant Godar participates in the enforcement and administration of the laws governing state elections within Wisconsin.

11. Mark Sostarich is a member of the Wisconsin State Elections Board. In his capacity as a member of the Board, defendant Sostarich participates in the enforcement and administration of the laws governing state elections within Wisconsin.

12. Robert Turner is a member of the Wisconsin State Elections Board. In his capacity as a member of the Board, defendant Turner participates in the enforcement

and administration of the laws governing state elections within Wisconsin.

13. John Niebler is a member of the Wisconsin State Elections Board. In his capacity as a member of the Board, defendant Niebler participates in the enforcement and administration of the laws governing state elections within Wisconsin.

14. Evan Zeppos is a member of the Wisconsin State Elections Board. In his capacity as a member of the Board, defendant Zeppos participates in the enforcement and administration of the laws governing state elections within Wisconsin.

15. Kevin Kennedy, the executive director of the Board, is the chief election officer for the State of Wisconsin. Sec. 5.05(1)(a), Wis. Stats. Pursuant to authority granted to Mr. Kennedy under election regulations promulgated by the Board, Mr. Kennedy is authorized to provide advice to any interested person with respect to the proper application of the campaign financing laws. *See* El. Bd. Reg. 6.03.

16. At all times material to this action, the named defendants and their officers, agents, servants and employees have acted and continue to act under color of statutes, ordinances, rules, regulations, customs and usages of the State of Wisconsin.

BACKGROUND FACTS

17. On or about May 16, 1988, WEAC announced to its members that it was seeking to hire approximately twenty (20) interns from among its members who would

work between June and November, 1988 to mobilize the WEAC membership in support of candidates that WEAC had endorsed or would be endorsing in campaigning for seats in the Wisconsin Senate and Assembly. WEAC announced that interns would be required to work full-time for ten weeks throughout the summer and, when school resumed in late August, would be required to work two evenings per week and two Saturdays per month until the November elections. In addition, WEAC announced that each intern hired would receive a salary of seven thousand five hundred dollars (\$7,500.00) and would be reimbursed for travel expenses. The salaries and expenses of the interns are paid for out of the WEAC-PAC budget. (See *Update for WEAC Leaders*, No. 30, attached hereto as Exhibit A.)

18. Also in or about May, 1988, WEAC created a job description for the intern position. According to such job description, the responsibilities for the position included a) identifying WEAC members who live in particular Assembly districts; b) compiling a list of member telephone numbers; c) organizing and implementing a voter identification and registration plan for WEAC members; d) assisting in research projects directed at studying past voting patterns of WEAC members; e) developing sign-up sheets, time sheets, and lists for and of WEAC volunteers; f) developing a list of community activities at which WEAC members could participate and advocate the election of candidates endorsed by WEAC; g) informing members when candidates planned to be in their localities; h) organizing and supervising direct mailings to the membership; i) preparing materials, finding volunteers, and coordinating legislative drops; j) contacting

members for placements of yard signs; k) organizing and supervising telephone banks at which members would be called; l) surveying WEAC members for attitudes concerning candidates WEAC had endorsed; m) organizing a "get out the vote" effort among WEAC members in the primary and general elections; and n) recruiting WEAC members to be poll watchers. (See Job Description For WEAC Legislative Intern, attached hereto as Exhibit B.)

19. Prior to July 25, 1988, the interns were hired and commenced work pursuant to the job descriptions.

20. Due in large measure to candidates who believed they would not be supported by plaintiffs, the proposed intern program received widespread publicity throughout the Wisconsin media. (See, e.g., p. 1 of the August 4, 1988 *Daily Jefferson County Union*, attached hereto as Exhibit C.)

21. On information and belief, the publicity engendered by the proposed intern program prompted defendant Thomas Godar to request the Board to place the intern Program on the agenda for the Board meeting scheduled for July 25, 1988. Defendant Godar issued this request despite the fact that no individual or entity had filed a complaint with the Board alleging that the intern program would in any way violate any law or regulation of the State of Wisconsin. On information and belief, the Board in fact placed the intern program on the agenda for its July 25, 1988 meeting over the vigorous objection of several Board members. (See July 22, 1988 memorandum of Kevin Kennedy, executive director of the Board and chief election officer of the State of Wisconsin, attached hereto as Exhibit D.)

22. In the July 22, 1988 memorandum to all members of the Board, Kevin Kennedy, executive director of the Board and chief election officer of the State of Wisconsin, indicated that the following:

The job description states that the intern will work solely with WEAC members, except in areas where WEAC makes independent expenditures. The intern will also be involved in sign placement and literature distribution. This cannot be done without contact with the candidate or agents of the candidate. A question arises whether an intern who has contact with a candidate or candidate's organization can be involved in independent activity. By definition if WEAC undertakes any kind of independent activity, it may not be done at the request or suggestion of the candidate or any agent of the candidate. s. 11.06(7), Stats. El.Bd. 1.42 Wis.Adm.Code. Such independent activity also may not be done in cooperation or consultation with the candidate or candidate's agent.

On information and belief, no member of the Board at that time expressed disagreement with the conclusions stated in Mr. Kennedy's memorandum. (See memorandum, Exhibit D.)

23. Section 11.26(2)(b), Wis. Stats., provides that no committee other than a political party committee may make contributions to any candidate for state senator in excess of one thousand dollars (\$1,000.00). Section 11.26(2)(c), Wis. Stats., provides that no committee other than a political party committee may make contributions to any candidate for representative to the assembly in excess of five hundred dollars (\$500.00).

24. Section 11.01(6)(a), Wis. Stats., provides that "contribution" includes "a gift, subscription, loan, advance, or deposit of money or anything of value . . . made for political purposes." Section 11.01(6)(b)1., Wis. Stats., excludes from the definition of "contribution" services by any individual on behalf of a committee who is not compensated specifically for such services.

25. Section 11.06, Wis. Stats., provides that each disbursement made by a registered committee must, be reported to the Board in a manner prescribed by the Board.

26. Section 11.29, Wis. Stats., provides as follows:

Nothing in this chapter restricts any . . . voluntary association other than a political party or personal campaign committee from making disbursements for the purpose of communicating only with its members . . . to the exclusion of all other persons, with respect to endorsements of candidates . . . or explanation of its views or interests, without reporting such activity.

27. On the afternoon of July 25, 1988, shortly before the Board meeting was to begin, a representative of the Board placed a telephone call to plaintiffs' offices summoning a representative of plaintiffs to the meeting, in order that plaintiffs could be informed of the Board's "concerns" about the intern program and have an opportunity to address those concerns. Michael Brennan, legislative director of WEAC, appeared at the Board meeting to discuss with Board members the intern program and its compliance with the campaign financing laws of the State of Wisconsin.

28. Based principally on comments made by Board members at the July 25, 1988 meeting, Mr. Brennan formed the opinion that expenses incurred by the interns in connection with communications made exclusively to WEAC members that had been caused, directly or indirectly, by the request or suggestion of a candidate or candidate's committee constituted contributions that would cause WEAC-PAC to exceed the contribution limits in the campaign financing laws. (See Complaint ¶ 23.). Accordingly, on July 29, 1988, Mr. Brennan, fearing enforcement of the civil and criminal sanctions set forth in the campaign financing laws for violation of the reporting and contribution limitations, directed all of the interns to avoid contact with candidates. A copy of Mr. Brennan's July 29 memorandum is attached hereto as Exhibit E.

29. By letter from Kevin Kennedy dated August 2, 1988, the Board notified WEAC that the Board had declined to pursue the matter "because there were no allegations that [WEAC] has acted inconsistent with the law." In the letter, however, Mr. Kennedy enclosed a copy of his July 22 memorandum to the Board, in which Mr. Kennedy had reported that the Board's staff believed certain activities to be undertaken by the interns would constitute contributions - and thus trigger the reporting provisions of the campaign financing laws - if such activities had been facilitated by contact with the candidate or any agent of the candidate. Mr. Kennedy advised WEAC that it was free to get back in touch with the Board should WEAC "have questions concerning the proper application of Wisconsin's campaign finance disclosure law to political activities in which your organization has become

involved." (See August 2, 1988 letter from Kevin Kennedy to Michael Brennan, attached hereto as Exhibit F.)

30. Upon receiving the letter and its enclosed memorandum, plaintiffs were unable to discern the precise nature of the "concerns" expressed in the memorandum. This lack of understanding prompted Plaintiffs to conclude that they could not proceed with plans for the intern program without running a substantial risk that the Board would seek to charge plaintiffs with violating the reporting and contribution limitation provisions of the campaign financing laws.

31. Accordingly, to obtain a clear understanding of the Board's "concerns" about the intern program and whether it believed the program could operate within the bounds of Wisconsin law, on August 17, 1988 counsel for plaintiffs met with Kevin Kennedy, the Board's executive director, and two other members of the Board's staff at the Board's offices in Madison, Wisconsin. At the meeting, counsel for plaintiffs explained that, in the course of discharging their responsibilities, the interns would be occasionally called upon to interact, directly or indirectly, with representatives of endorsed candidates prior to making a determination of how to deploy unpaid WEAC volunteers in a manner best suited to the promotion of plaintiffs' best interests. Counsel for plaintiffs stated that, in plaintiffs' judgment, § 11.29, Wis. Stats., completely exempted from both the reporting and contribution provisions of the Wisconsin campaign financing laws any costs incurred by the interns for purposes of communicating exclusively with WEAC members, even when the communication is prompted by direct or indirect contact with an endorsed candidate or the campaign organization

of an endorsed candidate. Moreover, counsel for plaintiffs stated that, in plaintiffs' judgment, any attempt to limit § 11.29 so as to render the campaign financing laws amenable to regulating communications between the interns and WEAC members would unconstitutionally infringe upon rights of freedom of association and expression protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Wisconsin Constitution.

32. Mr. Kennedy, chief election officer of the State of Wisconsin, expressed complete disagreement with plaintiffs' interpretation of the reach and constitutional validity of the Wisconsin campaign financing laws. According to Mr. Kennedy, § 11.29, Wis. Stats., does not exempt from the reporting and contribution provisions of the Wisconsin campaign financing laws the costs incurred with respect to communications sent from the intern to WEAC members when the communication is prompted by direct or indirect contact with the endorsed candidate or the campaign organization of an endorsed candidate. According to Mr. Kennedy, moreover, nothing in the Wisconsin or United States Constitutions limits the power of the Wisconsin legislature to regulate communications between the interns and WEAC members.

33. Responding to counsel for plaintiffs' request that Mr. Kennedy discuss this interpretation of § 11.29, Wis. Stats., in the context of circumstances that occur every day in the course of an election campaign and thus circumstances in which the interns would frequently find themselves situated, Mr. Kennedy agreed to discuss the issue of political rallies. According to Mr. Kennedy, if a WEAC intern learns, directly or indirectly, from an

endorsed candidate or the organization of an endorsed candidate that the candidate is planning a rally, and if the intern then proceeds to make telephone calls and write letters to WEAC members, encouraging them to attend the rally on their own time as volunteers to demonstrate their support for the candidate, any costs incurred by the intern in pursuing these contacts with WEAC members – including the costs of postage, telephone calls, the intern's salary and overhead – constitute contributions to the candidate within the meaning of the campaign financing laws of Wisconsin.

34. Mr. Kennedy expressed the indential belief with respect to the dissemination of literature by WEAC members on their own time as volunteers in support of an endorsed candidate. According to Mr. Kennedy, if WEAC members volunteer to distribute campaign literature on their own time as volunteers in support of an endorsed candidate and their activity can in any way be traced to a communication, direct or indirect, from the candidate or the candidate's organization to the intern, any expenses incurred by the intern in organizing unpaid WEAC members to assist as volunteers in the distribution – including once again the costs of telephone calls, postage, the intern's salary and overhead – constitute reportable contributions to the candidate's campaign.

35. These opinions were reconfirmed by Mr. Kennedy in a conversation held with counsel for the plaintiffs on September 2, 1988.

36. Plaintiffs believed that, if enforced, the ramifications of defendants' reading of the campaign financing laws would be devastating to plaintiffs and to WEAC

members. Because many communications that each intern makes to WEAC members in the course of an election campaign would constitute a contribution, WEAC-PAC would rapidly arrive at the contribution limitations provided in the campaign financing laws, resulting in a complete bar to further communications between the intern and the WEAC members. Under this interpretation of the campaign financing laws, therefore, members of the same organization would no longer be able to speak with one another about one of the very things that compelled them to join forces in the first place: the best interests of the teachers, administrators and educational employees of the State of Wisconsin.

37. Another consequence of this interpretation of the campaign financing laws would be that, in an election year such as this one, a multitude of conversations between the intern – a member of WEAC – and any other member of the organization would have to be reported to an administrative agency: the Wisconsin State Elections Board. Once again, such a result would undermine one of the most fundamental reasons for which WEAC members chose to join the association: to discuss common goals and interests in an atmosphere of privacy and confidentiality.

38. In addition, plaintiffs believe that the results that would ensue were this interpretation of the campaign financing laws enforced are not consistent with the intent of the Wisconsin Legislature as expressed in the Wisconsin campaign financing laws. Nor, plaintiffs contend, are they what the Legislature in fact accomplished by enacting the reporting and contribution provisions of such laws. Plaintiffs believe that the very presence of

§ 11.29 in the campaign financing laws demonstrates that the Legislature did not intend to regulate and did not in fact regulate communications within an organization such as WEAC. Section 11.29 demonstrates unmistakably that the Wisconsin Legislature intended to exclude from the operation of its campaign financing laws, and did in fact so exclude from the reach of such laws, precisely those activities of the interns that the named defendants through Mr. Kennedy have informed plaintiffs constitute reportable contributions: expenses incurred for the purpose of communicating only with WEAC members.

39. Plaintiffs disagree with more than simply defendants' statutory interpretation. Plaintiffs also believe that such laws could not be applied to regulate or penalize communications between a WEAC employee and WEAC members. Plaintiffs believe that the rights of freedom of association and freedom of expression protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Wisconsin Constitution preclude the application of Wisconsin's campaign financing laws in any manner that would penalize communications between the interns and WEAC members. In addition, plaintiffs believe that, to the extent § 11.29 is interpreted so as to regulate communications between an intern and WEAC members, the section is sufficiently vague as to fail to put plaintiffs on notice as to precisely what forms of intra-associational communications remain within the boundaries of the reporting and contribution provision.

40. Despite the fact that all communications from the intern intended exclusively for WEAC members are

exempted from the campaign financing laws and protected by the United States and Wisconsin Constitutions, plaintiffs are threatened with substantial penalties – civil and criminal – should they allow the interns to undertake some of the responsibilities for which they were hired. Section 11.60(1), Wis. Stats., provides that each violation could result in a forfeiture of up to five hundred dollars (\$500.00). Section 11.60(3), Wis. Stats., provides that any contribution made in violation of the campaign financing laws could result in the forfeiture of treble the amount of the contribution. Section 11.61(b), Wis. Stats., provides that each intentional violation of the contribution limitations could subject plaintiffs to a fine of ten thousand dollars (\$10,000.00) and six (6) months imprisonment. At the August 18, 1988 meeting, the Board's staff gave every indication that it would be amenable to charging plaintiffs for these acts of its interns.

41. For all the above reasons, on September 7, 1987, plaintiffs instituted an action in the Circuit Court for Dane County (Case No. 88-CV-4948) against the Board and its members, seeking, *inter alia*, a declaratory judgment providing that plaintiffs need not report as contributions within the meaning of the Wisconsin campaign financing laws expenses incurred for any communications from an intern intended exclusively for WEAC members, even if such communications are made, directly or indirectly, in concert with or at the direction or suggestion of a candidate or candidate's campaign committee. In the alternative, plaintiffs sought a declaratory judgment providing that, if and insofar as § 11.29, Wis. Stats., was enforced or administered so as to regulate communications from an intern to a WEAC member, such

section as applied would violate the freedom of expression and freedom of association guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I. Section 3 of the Wisconsin Constitution, and was, moreover, unconstitutionally vague in violation of the First and Fourteenth Amendment to the United States Constitution. On September 16, 1988, plaintiffs filed an Amended Complaint adding Kevin Kennedy as a named defendant. In all other material respects, however, the Amended Complaint was identical to the Complaint.

42. On September 20, 1988, the Honorable Moria Krueger issued a memorandum decision and order dismissing the Amended Complaint without prejudice. The court, observing that "this action is premature," concluded that, as a matter of law, plaintiffs had failed to exhaust their administrative remedies because they had failed to request a formal opinion from the Board pursuant to § 5.05(6), Wis. Stats. A copy of Judge Krueger's decision and order is attached hereto as Exhibit G. On September 28, 1988, plaintiffs appealed the dismissal to the Court of Appeals, District IV, filing a motion to accelerate the appeal as well. On October 7, 1988, the Court of Appeals issued an order denying plaintiffs' motion for an accelerated appeal. A copy of the order denying the motion for acceleration is attached hereto as Exhibit H.

43. By letter to Kevin Kennedy dated September 26, 1988, and at the same time that plaintiffs were pursuing their rights of appellate review, plaintiffs heeded Judge Krueger's admonition and filed a request for a formal opinion with the Board pursuant to § 5.05(6), Wis. Stats., urging the Board to act promptly in light of the fact that,

with each passing day, plaintiffs were forced to either forego their first amendment rights or intentionally flout the warnings of the chief election officer of Wisconsin and assume the attendant risks of civil and criminal penalties. A copy of the letter is attached as Exhibit I.

44. Pursuant to § 5.05(6) Wis. Stats., the Board was required within fifteen (15) days of such request for a formal opinion to "advise the person requesting an opinion whether or not a formal opinion will be issued." To this day, the Board has failed to so advise plaintiffs.

45. By memorandum dated October 3, 1988, Kevin Kennedy advised members of the Board of plaintiffs' request for a formal opinion. In addition, Kennedy informed Board members that the executive director of the Republican Party of Wisconsin had also requested a formal opinion on the matter. In the course of the memorandum, Kennedy took a position strikingly different from the position he (and the Board) had assumed both in discussions with plaintiffs' counsel and in litigation, contending now - for the very first time - that "the application of the law does not turn on whether the communications are initiated at the request or suggestion of a candidate, but on the nature of the communications to the membership." The October 3 memorandum is attached hereto as Exhibit J.

46. On October 5, 1988, the Board held a hearing at which counsel for plaintiffs discussed the intern program with members of the Board. At the hearing, a motion by a Board member to issue no opinion on the matter failed to carry by a vote of three to three. Similarly, a later motion to issue a formal opinion consistent with position of the

plaintiffs likewise failed by a tie vote. Accordingly, the Board failed to take any action whatever on the intern matter at the October 5 meeting. A partial transcript of the October 5 meeting is attached hereto as Exhibit K.

47. A week later, on October 12, 1988 the Board again gathered with counsel for plaintiffs to discuss the matter of the WEAC intern program, this time in Milwaukee, Wisconsin. At the meeting, the Board again undertook to resolve the matter, but again failed to take any action whatever even failing to decide whether the Board would issue the formal opinion requested by plaintiff.

48. More than fifteen (15) days elapsed from the time plaintiffs requested a formal opinion pursuant to § 5.05(6). Accordingly, the Board failed to comply with § 5.05(6) due to its failure to decide whether it would issue an opinion.

49. On October 18, 1988, after the fifteen (15) days had expired, the Board again met to discuss the intern program, this time in Waukesha, Wisconsin. By a vote of four to three, the Board voted to adopt the recommendation of Kevin Kennedy initially submitted to the Board with Mr. Kennedy's October 3, 1988 memorandum, attached hereto as Exhibit J (pp. 60, 61).

50. Plaintiffs have no adequate remedy at law.

FIRST CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

[The Wisconsin Campaign Financing Laws]

51. The allegations of paragraphs 1 through 50 are incorporated herein and realleged as though fully set forth.

52. Pursuant to § 11.29, Wis. Stats., the Wisconsin Legislature has exempted from the contribution and reporting provisions of the Wisconsin campaign financing laws any and all expenditures incurred with respect to WEAC interns in communicating with WEAC members about matters arising out of or relating to plaintiffs' endorsements of candidates or the explanation of the views or interests of WEAC or WEAC-PAC.

**SECOND CLAIM FOR DECLARATORY AND
INJUNCTIVE RELIEF**

[42 U.S.C. § 1983, Void for Vagueness]

53. The allegations of paragraphs 1 through 50 are incorporated herein and realleged as though fully set forth.

54. To the extent that § 11.29, Wis. Stats., purports to regulate or is applied so as to regulate communications between the interns and WEAC members, such section fails to afford plaintiffs any notice of what forms of expression come within the provisions of such section and is otherwise sufficiently vague so as to render it impossible for plaintiffs to conform their activities to the strictures of the section. Accordingly, the application of the Wisconsin campaign financing laws to communications between the interns and WEAC members violates the First and Fourteenth Amendments to the United States Constitution.

**THIRD CLAIM FOR DECLARATORY AND
INJUNCTIVE RELIEF**

**[42 U.S.C. § 1983 Freedom of Association
and Freedom of Speech]**

55. The allegations of paragraphs 1 through 50 are incorporated herein and realleged as though fully set forth.

56. Acting under color of the laws and regulations of the State of Wisconsin in their enforcement and administration of the Wisconsin campaign financing laws, defendants have violated and continue to violate plaintiffs' rights to freedom of association and freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution. The threats made by the employees, agents and servants of the defendants, unless remedied by the court, have had and continue to have a chilling effect on the exercise of the First and Fourteenth Amendment rights of the plaintiffs' freedom of association and speech.

**FOURTH CLAIM FOR DECLARATORY AND
INJUNCTIVE RELIEF**

[Article I, Section 3 of the Wisconsin Constitution]

57. The allegations of paragraphs 1 through 50 are incorporated herein and realleged as though fully set forth.

58. In their enforcement and administration of the Wisconsin campaign financing laws, defendants have violated and continue to violate plaintiffs' rights to freedom of association and freedom of speech guaranteed by Article I, Section 3 of the Wisconsin Constitution.

WHEREFORE, plaintiffs respectfully pray that the Court enter judgment in its favor and against defendants as follows:

(1) Declaring that, pursuant to § 11.29, Wis. Stats., plaintiffs need not report as contributions within the meaning of the Wisconsin campaign financing laws, ch. 11, Wis. Stats., expenses incurred for any communication from an intern intended exclusively for WEAC members, even when such communications are made, directly or indirectly, in concert with or at the direction or suggestion of a candidate or a candidate's campaign committee;

(2) Declaring that, if and insofar as § 11.29, Wis. Stats., is enforced or administered so as to regulate communications from an intern to a WEAC member, such section is unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution;

(3) Declaring that, if and insofar as the Wisconsin campaign financing laws seek to regulate or are applied so as to regulate communications from an intern to a WEAC member, such laws violate the freedom of expression and freedom of association protected by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the Wisconsin Constitution;

(4) Issuing a temporary and permanent injunction ordering that defendants may not regulate communications from an intern to any member of WEAC;

(5) Awarding plaintiffs actual costs and attorney's fees pursuant to 42 U.S.C. § 1988; and

(6) Awarding plaintiffs such other legal and equitable relief as the court deems appropriate.

Dated at Milwaukee, Wisconsin, this 19th day of October, 1988.

FRIEBERT, FINERTY & ST. JOHN, S.C. _____

Robert H. Friebert

Charles D. Clausen

By: /s/ Robert H. Friebert

Robert H. Friebert

Attorneys for Plaintiffs

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4320M

Update

for
WEAC
leaders

WISCONSIN EDUCATION ASSOCIATION COUNCIL



101 W. Baltimore Hwy. • P.O. Box 6003 • Madison, WI 53704

No. 30
May 16, 1983

WEAC Ready To Hire Political Action Interns

WEAC is currently hiring approximately 20 political action interns who will work with WEAC members for the election of pro-education candidates for the Wisconsin Legislature next November. The positions were approved by delegates to the 1988 WEAC Representative Assembly last month in an effort to recruit and elect Wisconsin Senate and Assembly candidates who support improving pensions for school employees, maintaining the mediation-arbitration law and opposing punitive cost controls on public schools.

The jobs are for ten weeks this summer, and, once school starts in late August, require that interns work three hours for two evenings during the week and two Saturdays per month during September, October and the first week in November.

WEAC would prefer that the interns live in or near the following cities or counties.

COUNTIES

Crawford	Jackson	Manominee	Shawano
Dunn	La Crosse	Monroe	Sheboygan
Florence	Lafayette	Oconto	St. Croix
Forest	Langlade	Oneida	Vernon
Green Lake	Lincoln	Onauke	Vilas
Iowa	Marathon	Pierce	Washington
	Marquette	Polk	Waukesha

CITIES

DePere	Janesville	Mequon	Waterford
Greendale	Jefferson	New Berlin	Watertown
Green Bay	Johnson Creek	Oak Creek	Whitefish Bay
East Troy	Kaukauna	Racine	Whitewater
Fort Atkinson	Lake Mills	Rochester	
Franklin	Muskego	Shorewood	

Pay for those assigned to work the full summer and fall period will be \$7,500 plus travel expenses. WEAC members will be given priority for these positions. To request an application, call WEAC Director of Legislation Michael Brennan (800) 362-8034 or (608) 235-2971. Requests for applications should be made by May 27.

DPI Report Shows Teacher Salaries Up 4.25 Percent

The average Wisconsin teacher salary for 1987-88 is \$28,998, according to the latest report released by the Department of Public Instruction. Calculations by the WEAC Collective Bargaining Division indicate that the figure represents a 4.25 percent

BEST AVAILABLE COPY

App. 56

Spurred by teacher, student and citizen pressure, the Janesville school board voted last month to reinstate nearly all of the 89 teachers to whom it had issued layoff notices in April. That action, combined with the fact that Janesville Education Association members have worked without a contract all year, had left Janesville teachers simmering.

The school board claimed the

layoffs were necessary due to uncertainty about legislative action on Gov. Thompson's school district cost control proposal. However, local reaction to the layoffs likely gave the school board pause to consider an alternative course.

Frustration and anger over the board's actions led students and parents, as well as the teachers to protest the wholesale staff reduction. Late last month over 400 Janesville

teachers picketed a school board meeting in protest of the layoffs and the unsettled contract.

Earlier, over 350 students at Janesville Craig High School walked out of their first-period classes in support of the teachers who received lay-off notices. The student protestors were suspended immediately because they violated school board policies concerning unlawful as-

suming a parent to be in a meeting day.

A mediator/arbitrator has been appointed to help resolve the tract deadlock, hardly a rare phenomenon in Janesville where every contract has gone to binding arbitration since the med/ar was enacted.

For fall political action

WEAC hiring interns

WEAC is currently hiring approximately 20 political action interns who will work with WEAC members for the election of pro-education candidates for the Wisconsin Legislature next November. The positions were approved by delegates to the 1988 WEAC Representative Assembly last month who approved a special one-time PAC assessment of \$10 per member in an effort to recruit and elect Wisconsin Senate and Assembly candidates who support improving pensions for school employees, maintaining the mediation-arbitration law and opposing punitive cost controls on public schools.

The jobs are for ten weeks this summer, and, once school starts in late August, require that interns work three hours for two evenings during the week and two Saturdays per month during September, October and the first week in November.

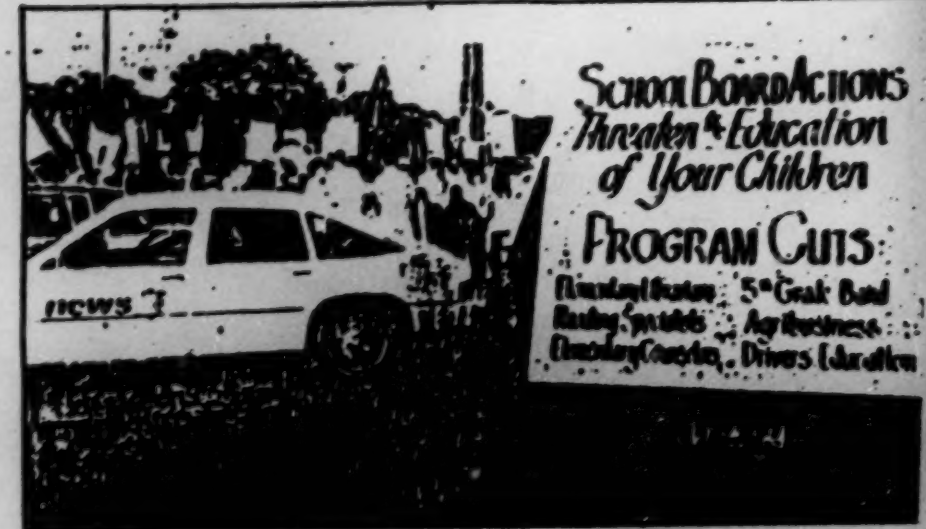
WEAC would prefer that the

interns live in or near the following cities or counties.

Counties: Crawford, Dunn, Florence, Forest, Green Lake, Iowa, Jackson, La Crosse, Lafayette, Langlade, Lincoln, Marathon, Marinette, Menominee, Monroe, Oconto, Oneida, Ozaukee, Pierce, Polk, Shawano, Sheboygan, St. Croix, Vernon, Vilas, Washington, and Washish.

Cities: De Pere, Greendale, Green Bay, East Troy, Fort Atkinson, Franklin, Janesville, Jefferson, Johnson Creek, Kaukauna, Lake Mills, Muskego, Neenah, New Berlin, Oak Creek, Racine, Rochester, Shorewood, Watertown, Watertown, Whitefish Bay, and White-water.

Pay for those assigned to work the full summer and fall period will be \$7,500 plus travel expenses. WEAC members will be given priority for these positions. To request an application, call WEAC Director of Legislation Michael Brennan (800) 362-8034 or (608) 255-2071. Since hiring is now underway, WEAC asks that application requests be made immediately.



*School Board Actions
Threaten Education
of Your Children*

PROGRAM CUTS:
Elimination of 5th Grade Band
Reduction in Art, Business
Elimination of Driver Education

Over 400 Janesville teachers let the school board know they are furious about not

having a contract and the board's layoff of 89 teachers.

WEAC leadership deadline is June

Local association leaders, reserve your spot at the 1988 WEAC Leadership Conference, August 7-11. Just a few weeks remain before the June 24 registration deadline for this year's conference which has a special one-time format designed to help local leaders use "direct action" techniques. Such tech-

niques will enable locals to the unprecedented circumstances now facing education in WI. Registration information sent to all WEAC local presidents. For answers to further questions contact Ann Blaubaum at the Madison office for further questions (800) 362-8034, (608) 255-

June 11, 1988
News & Views

EXHIBIT B

052388

WEAC GR-DIV

JOB DESCRIPTION FOR WEAC LEGISLATIVE INTERN

All interns will be assigned to work in an assigned legislative district. They will work under the direct supervision of one of the Political Action Consultants or one of the staff of the WEAC Government Relations Division. The intern will work solely with the WEAC members, except in areas where the WEAC makes independent expenditures.

Following are the activities the intern will be assigned to do:

1. To contact members for placement of yard signs.
2. To prepare materials and find volunteers for legislative drops.
3. To secure and divide community and legislative district maps into workable sections.
4. To develop sign-up sheets, voluntary time sheets, and volunteer kits.
5. To organize and implement an internal voter identification and registration plan.
6. To organize a "get out the vote" effort among the WEAC members in the primary and general elections.
7. To recruit WEAC members to be poll watchers.
8. To identify members by the Assembly District in which they live.
9. To survey members on their attitude to the WEAC endorsed candidates.

10. To compile a list of phone numbers of the membership.
11. To organize and supervise direct mail projects to the membership.
12. To develop a list of community activities where the members should participate and advocate the election of endorsed candidates.
13. To inform the membership when candidates will be in their locality.
14. To assist in research projects in targeting and past voter statistics of the membership.
15. To organize and supervise telephone banks to call members.
16. To perform other duties and activities as assigned.

Legislative interns will be hired to work a varying amount of time. Some interns will be hired to work for both the primary and general elections. Others will be hired to work only for the primary or only for the general election. Those individuals working the full schedule of five days a week for two weeks in June and the months of July and August (one of the five days may be a Saturday); and two evenings a week for three hours each plus Saturdays during the months of September, October and the first week of November will be paid \$7500. Individuals hired for a lesser amount of time will be paid a prorated amount of the \$7500 in relation to the amount of time they work to what is considered a full-time intern.

Enclosed is a job application. Please complete this job application and return it to:

App. 59

R. Michael Brennan
Director of Government Relations
P.O. Box 8003
Madison, Wisconsin 53708

If you have any additional questions concerning these positions, contact Mike Brennan at 1-800-362-8034 or (in Madison) 255-2971.

Note: Please return completed application as soon as possible. We are in the process of hiring.

Edington trying to buy election, Lewis claims

JEFFERSON — The key question in the fall's 38th Assembly District campaign is emerging, according to State Rep. Margaret Lewis: Will Madison-based lobby money or individual voters determine our next state representative?

According to Lewis, R-Jefferson, the 38th District has been included in a \$1 million play to "buy" control of the Legislature by the state's largest special interest group, the Wisconsin Education Association Council, the lobbying arm of the state teachers' union headquartered in Madison.

"This massive and unprecedented special interest meddling in the 38th District threatens a tradition of clean and fair politics in our area," Mrs. Lewis said.

Saying she would "have no part of big-money special interest politics," the Jefferson Republican pledged to refuse PAC special in-

terest contributions as she has done in her two previous campaigns.

Lewis also said she would abide by campaign spending limits set by state law, and renounce all special interest involvement in the 38th District.

Rep. Lewis called on her opponent, William Edington, D-Johnson Creek, to do the same. She added, "This should in no way be interpreted as an attack on teachers. Local teachers have called me to complain about the use of their union dues to defeat me when they know I'm a strong supporter of quality education."

Lewis also released a WEAC memo, dated May 18, that outlines the lobby's intent to pay \$7,500 plus expenses to 20 "campaign managers" in selected districts across the state, including the 38th District. That memo listed duties for "political interns," including

yard sign placement, literature drop coordination, voter identification and direct mail.

"What WEAC's activity amounts to," Rep. Lewis commented, "is a lobbying organization's attempt to fund, through under-the-table money, and effectively run the campaigns of selected candidates."

"What makes this so serious in our area is that my opponent is a WEAC member. He has been aware of this special interest attempt to circumvent campaign spending limits and election law for several months, and he has done nothing to discourage it. The likely result is that twice as much money will be spent on behalf of Mr. Edington as is allowable under campaign spending limits. In short, he gets two campaigns for the price of one."

Edington was campaigning in Janesville this morning and could



Rep. Margaret Lewis

not be reached for comment. State Elections Board staff has already expressed "concern" over this activity, Lewis said. She noted that in a July 23 memo, Kevin Kennedy, the board's executive director, wrote: "Any direct involvement by paid personnel providing support to candidate committees, including distribution of yard

WEAC

(Continued from page 1)

signs, literature, and contact with non-WEAC members, would have to be treated as an in-kind contribution to the candidate's campaign."

"This campaign is at a crossroads," Mrs. Lewis observed. "It can be clean and honest as the 1966 contest between Mr. Edington and myself was. Or it can become mired in a special interest attempt to buy a legislative seat for one of its members."

"The choice is my opponent's. I call on him to confess his knowledge of the special interest campaign being waged on his behalf. I further call on him to formally ask WEAC to cease its activity in the 38th District. Then we can get on with the real issues: job creation, real property tax relief and quality education."



Bill Edington

EXHIBIT D

DATE: July 22, 1988
TO: Elections Board Members
FROM: Kevin J. Kennedy
Executive Director
RE: Review of WEAC Political Intern Plan

On Wednesday, July 20, 1988, the Elections Board's executive director received a request from Board member Thomas Godar to place information relating to recruitment efforts by the Wisconsin Education Association Council (WEAC) to hire political action interns for the 1988 fall partisan elections on the agenda for this Board meeting. Attached to this memorandum is a copy of a WEAC update bulletin dated May 16, 1988 and a job description for the position. Also enclosed are copies of related news articles concerning this matter and a letter from the Committee to Elect a Republican Senate presenting a similar, albeit hypothetical, situation.

The Elections Board staff has reviewed the materials and has some initial concerns. The activity raises the question of proper allocation. Any direct involvement by paid personnel providing support to the candidate committee, including the distribution of yard signs, literature, and contact with non-WEAC members, would have to be treated as an in-kind contribution to the candidate's campaign. There are only two types of activity which might not be treated as in-kind contributions to a candidate's campaign by these interns. The first exception is any independent activity as defined in s.11.06(7), Stats. The second exception is for communication with the WEAC

membership of endorsements and explanations of its views and interests. ss.11.29(1), 11.38(2)(b), Stats. Such exempt communications do not include distribution of candidate literature, signs, buttons or other promotional paraphernalia.

The job description states that the intern will work solely with WEAC members, except in areas where WEAC makes independent expenditures. The intern will also be involved in sign placement and literature distribution. This cannot be done without contact with the candidate or agents of the candidate. A question arises whether an intern who has contact with a candidate or candidate's organization can be involved in independent activity. By definition if WEAC undertakes any kind of independent activity, it may not be done at the request or suggestion of the candidate or any agent of the candidate. s.11.06(7), Stats. El.Bd. 1.42 Wis.Adm.Code. Such independent activity also may not be done in cooperation or consultation with the candidate or candidate's agent. The intern is clearly going to have interaction with candidate organizations since the intern will be placing yard signs, gathering materials and finding volunteers for literature drops. If the interns are involved in independent activity, it may be difficult to separate intern/candidate interactions from WEAC's independent activity.

The Elections Board staff recommends that the Board discuss this matter to identify any issues it is concerned with and provide direction to the staff on what further action to take. The staff believes that there should be some written communication to the Wisconsin Education Association Council expressing the Board's concerns and directing WEAC to carefully review the law to assure that

the activity is properly reported as an in-kind contribution, independent activity or membership contact.

KJK:cj
Attachments

EXHIBIT E

WISCONSIN EDUCATION ASSOCIATION COUNCIL

101 W. Beltline Hwy.
P.O. Box 8003
Madison, WI 53708
(608) 255-2971 (800) 362-8034

July 29, 1988

MEMORANDUM

TO: WEAC Legislative Interns
FROM: Mike Brennan
RE: Election Board

On Monday, July 26, 1988, I was requested to appear before the Election Board. The purpose of this request was to inquire as to what our interns would be doing in these elections. I assured the Election Board that your job specifically was to work with the membership in all cases except when we decided to do independent expenditures.

The purpose of this memo is to once again restate that you are not to have any direct communication with anyone involved in a legislative campaign, an incumbent legislator or an individual running for office. The job you will be doing will be assigned by the staff person you are

assigned to work under. If there are any inquiries made by any individuals, including WEAC members, as to whether you can do a job, please refer them to the WEAC Political Action Consultant. We realize that some of the inquiries may even come from friends or individuals that you work with, but it is our intent to make sure that we stay within the letter of the law.

Your cooperation in this matter will be greatly appreciated and it could keep us from having major problems at a later date. If you have any questions pertaining to this memo or any facets of your job, please contact the Political Action Consultant that you are assigned to work under. If for any reason you feel they cannot clarify your question, feel free to call me.

RMB:kc

EXHIBIT F

(seal) State of Wisconsin - ELECTIONS BOARD

August 2, 1988

132 EAST WILSON STREET
THIRD FLOOR
MADISON, WISCONSIN 53702
(608) 266-8005

JOHN NIEBLER
CHAIRMAN

Kevin J. Kennedy
Executive Director

Mr. Michael Brennan
Legislative Director
Wisconsin Education Assoc. Council
101 W. Beltline Hwy.
P.O. Box 8003
Madison, WI 53708

Dear Mr. Brennan:

On behalf of the members of the Elections Board I would like to thank you for attending the Elections Board meeting on Monday, July 25, 1988. We appreciate your willingness to discuss the political action intern plan that the Wisconsin Education Association Council has begun. Because there were no allegations that the Wisconsin Education Association Council has acted inconsistent with the law, the Elections Board took no action on this matter.

I have enclosed an additional copy of the staff memorandum summarizing the reporting of activities of paid personnel involved in the political process. If you or any representative of the Wisconsin Education Association have questions concerning the proper application of Wisconsin's campaign finance disclosure law to political activities in which your organization has become involved, I encourage you to contact our office.

Again, on behalf of the Board, thank you for your willingness to appear before the Board and share your ideas with us and respond to questions raised by Board members.

STATE ELECTIONS BOARD

/s/ Kevin J. Kennedy

Kevin J. Kennedy
Executive Director

KJK:cj

Enc.

App. 66

STATE OF WISCONSIN CIRCUIT COURT DANE
COUNTY

Branch VII

WISCONSIN EDUCATION
ASSOCIATION COUNCIL and
WEAC-PAC,

Plaintiffs,

vs.

THE WISCONSIN STATE
ELECTIONS BOARD,
PETER DOHR, FREDERIC
MOHS,
THOMAS GODAR, MARK
SOSTARICH,
ROBERT TURNER, JOHN NIEBLER,
EVAN ZEPPUS, KEVIN KENNEDY,
and

Their Officers, Agents, Servants,
and Employees,

Defendants.

Case No.
88 CV 4948

MEMORANDUM
DECISION AND
ORDER

BACKGROUND

Plaintiffs have asked this court for declaratory judgment and injunctive relief in regard to the interpretation of Wis. Stat. sec. 11.29 as propounded by defendant, Kevin Kennedy, who is the executive director of the State Elections Board. Defendants have moved to dismiss on several grounds, the determinative ground being an argument as to ripeness of this controversy.

The facts necessary for a ruling on the motion to dismiss are not at issue. As of July 25, 1988, plaintiffs

were put on notice that Mr. Kennedy and some Board members were concerned that expenses incurred by plaintiffs' interns in connection with communications to WEAC members occurring at the request or suggestion of a candidate, a candidate's committee or agent would have to be reported as a campaign contribution. According to plaintiffs, such an interpretation would cause WEAC-PAC to exceed contribution limits in campaign financing laws. The Board, itself, has not spoken on this issue.

On September 7, 1988, plaintiffs brought this action asking, in essence, that this court prohibit the Board from acting in conformity with the interpretation given sec. 11.29 by the Board's executive director.¹

DECISION

Wis. Stats. sec. 5.05 spells out clearly the structure and functions of the Wisconsin Elections Board. Its duty is "the administration of chs. 5 to 12 and other laws relating to elections and election campaigns." Under (1)(f) of this enabling statute, the Board is charged with "interpreting . . . laws regulating the conduct of elections or election campaigns or ensuring their proper administration." The same statute specifically lists what duties

¹ Plaintiffs' second claim for relief appears to allege that Wis. Stat. sec. 11.29 is unconstitutionally vague as written, but that claim goes on to complain about application. Neither side to this cases has briefed or argued this claim as a ground for injunctive relief. It is clear from all the arguments so far that plaintiffs' concern is really the interpretation of sec. 11.29 and not the language of that statute, itself.

may be delegated to the executive director. The responsibility for "interpreting the laws" is not one of the duties that may be delegated under this statute.

Care has been taken in examining the respective duties of the Board and its executive director because all that plaintiffs have been able to allege as a basis for their requested relief is that the executive director has interpreted Wis. Stat. sec 11.29 in an unconstitutional manner. Although individual Board members and the Assistant Attorney General representing the defendants may have concurred with Mr. Kennedy's reading of the statute, the plaintiffs are unable to allege that the Board, itself, has done anything violative of their rights.

This fact is of particular significance since plaintiffs had it within their power to trigger action from the Board simply by requesting a formal opinion under the provisions of Wis. Stat. 5.05(6). Instead, they commenced a circuit court action pleading for invocation of an extraordinary remedy - a temporary injunction.

This action is premature. Plaintiffs have argued that to request a formal opinion would have so delayed a determination as to have forced them to await a decision until after this Fall's elections. This simply is not true:

The board shall within 15 days advise the person requesting an opinion whether or not a formal opinion will be issued. If a formal opinion will be issued, it shall be issued within 30 days of the request.

Even if plaintiffs had taken a few days to mull over the situation after being informed of Mr. Kennedy's position, by requesting a formal opinion by August 1, 1988 they would have known by August 15 whether the Board would give them an opinion. If the Board decided to give an opinion, plaintiffs would have known by August 30, 1988 what that opinion was, a full week before this Circuit Court action was commenced.

By proceeding as they did, plaintiffs have created their own problem as to the passage of time during this election season. They have risked a potential wasting of time on this lawsuit when they could have been finding out whether their rights are as jeopardized as they claim.

Until the Elections Board speaks as an official body, no one knows what its position is on the need to report certain activities of plaintiffs' interns. A solidly grounded suspicion is not a sufficient basis for the issuance of a temporary injunction or the rendering of declaratory judgment. There is no guarantee that the Board will agree with its executive director. There is no other way to characterize the facts offered by plaintiffs than as "contingent." (See, *Loy v. Bunderson*, 107 Wis.2d 400 at 412, (1982)).

As was succinctly stated by defendants, "It is the job of the Board, not this court, to apply the Campaign Finance Act to specific fact situations." (p. 8, Defendant's September 21, 1988 brief). Plaintiffs must first give the Board the opportunity to do its job before it can receive redress from a court.

For the similar but more compelling reasons as were given in *The Sierra Club, et al vs. Federal Election Commission, et al.*, 593 F.Supp. 166 (1984), defendants' motion to dismiss is granted, and no opinion is expressed as to the merits of plaintiffs' claims.

ORDER

For the reasons expressed in the preceding Memorandum Decision, IT IS HEREBY ORDERED that this case be and hereby is DISMISSED without prejudice.

Dated this 26th day of September, 1988 at Madison, Wisconsin.

BY THE COURT:
/s/ Moria Krueger
Moria Krueger, Judge.

Copies:
Attorney Robert H. Friebert
Assistant Attorney General Alan Lee

DISTRICT IV
Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves Clerk	Madison, October 7, 1988 Alan Lee Asst. Attorney General
Robert H. Friebert Charles D. Clausen 330 E. Kilbourn Ave., Ste. 1250	

TO: Milwaukee, WI 53202

Richard V. Graylow
Lawton & Cates
214 W. Mifflin St.
Madison, WI 53703

You are hereby notified that the Court entered the following order:

#88-1827 – Wisconsin Education Association Council et al

v.

Wisconsin State Elections Board et al.

Before Dykman, J.

The plaintiffs appealed the September 26, 1988 order dismissing the action. The plaintiffs also filed a motion in this court requesting acceleration of the appeal. On September 30, 1988, this court ordered a response to the motion. The response has been received by the court. Ordinarily, this court will expedite any appeal if sufficient grounds are shown to justify the accelerated procedure. However, with the election occurring on November 8, 1988, the court concludes that insufficient time remains prior to the election to allow meaningful briefing by the parties and an adequate time for an opinion to be issued by the court. In addition, action by the Elections Board could very well moot this appeal. The court concludes that the motion for acceleration should be denied.

App. 72

Upon the foregoing reasons,

IT IS ORDERED that the motion for acceleration is denied.

Marilyn L. Graves
Clerk of Court of Appeals

EXHIBIT I

FRIEBERT, FINERTY & ST. JOHN, S.C.
ATTORNEYS AT LAW
TWO PLAZA EAST SUITE 1250
330 EAST KILBOURN AVENUE
MILWAUKEE, WISCONSIN 53202

ROBERT H. FRIEBERT	TELEPHONE
JOHN O. FINERTY	414 272-0130
THOMAS W. ST. JOHN	TELECOPIER
CHARLES D. CLAUSEN	414 272-8191
WILLIAM S. GUIB	
DAVID P. LOWE	TWX
WILLIAM S. ROUSH, JR.	910-333-0249
COROELIA S. MUNROE	(FFSS MILW)
WILLIAM M. FITZGERALD	
CAREN S. GOLDBERG	
S. TODD FARRIS	
LAURA E. CAMPBELL	
TED A. WARPINSKI	

September 26, 1988

VIA FEDERAL EXPRESS

Kevin Kennedy, Esq.
Executive Director
Wisconsin State Elections Board
132 East Wilson Street
Madison, Wisconsin 53703

RE: Wisconsin Education Association Council and
WEAC-PAC v. The Wisconsin State Elections Board,
et al.;
Dane County Circuit Court Case No. 88-CV-4948

Dear Mr. Kennedy:

As you know, we represent plaintiffs in the above-captioned matter. Enclosed please find the pleadings and supporting documents setting forth both plaintiffs' positions and the positions taken by defendants.

In a memorandum order dated today and also enclosed herein, Judge Krueger accurately states the issue that divides the parties: plaintiffs believe that, under the Wisconsin campaign financing laws, they need not report as contributions expenses incurred in connection with communications to WEAC members, even if such expenses occur at the request or suggestion of a candidate. Defendants believe that such expenses, if prompted by candidate conduct, constitute contributions and need be reported.

Pursuant to section 5.05(b) of the Wisconsin Statutes, we hereby request a formal opinion of the Board concerning this matter. Such a request should pose little, if any, inconvenience for the Board, since the Attorney General, in a brief also enclosed herein, has already indicated that the Board completely disagrees with plaintiffs' interpretation of the campaign financing laws. Accordingly, the matter should consume only a few moments of the Boards' time at the meeting scheduled for Wednesday, October 5, 1988.

The November election is hard upon us. Unless the Board decides this matter promptly, our clients will remain in

the infelicitous dilemma of either foregoing their First Amendment rights during this general election or undertaking conduct that amounts to the deliberate and intentional flouting of the warnings of the chief election officer of Wisconsin and, presumably, the State Elections Board.

Very truly yours,

FRIEBERT, FINERTY & ST. JOHN,
S.C.

/s/ Charles D. Clausen
Robert H. Friebert
Charles D. Clausen

RHF/CDC:dml:9079C

Enclosures

cc: Mr. James Blank (w/Encs.)
Mr. Morris Andrews (w/Encs.)
Mr. Donald Krahn (w/Encs.)

bcc: Richard V. Graylow, Esq. (w/Encs.)

DATE: October 3, 1988

TO: Elections Board Members

FROM: Kevin J. Kennedy
Executive Director

RE: Wisconsin Education Association Council
Request for Formal Opinion Relating to Communications to Members at the Request of a Candidate

The Wisconsin Education Association Council (WEAC), through its counsel, Robert H. Friebert, has requested the Elections Board to issue a formal opinion pursuant to

s.5.05(6), Stats., on the question whether any communication made to its membership at the request or suggestion of a candidate must be reported as a contribution under Wisconsin's campaign finance law. The Republican Party of Wisconsin, through its executive director, has also asked the Board to address the issue in the form of a formal opinion. Upon receiving the requests, I provided Elections Board members with a copy of the original requests along with all the supporting court documents from the civil action initiated by the Wisconsin Education Association Council in Dane County Circuit Court. *WEAC and WEAC PAC v. the Wisconsin State Elections Board et. al.*; *Dane County Circuit Court Case No. 88CV4948.*

On Monday, September 26, 1988, Judge Moria Krueger dismissed the lawsuit which sought to enjoin the Board from taking any action to enforce its position on the issue presented. The judge ruled that there was no justiciable controversy at this time. While the pleadings filed in the court action deal with the issue of justiciable controversy, the documents also shed light on the application of the campaign law to the communication issue. WEAC's opinion request was submitted the next day. WEAC also appealed Judge Krueger's decision, requesting expeditious review by the Court of Appeals.

This memorandum identifies the issue presented by the opinion request, discusses the applicable law, and sets forth a proposed formal opinion.

Issue Presented.

The Wisconsin Education Association Council has framed the legal issue as follows:

Do expenditures which are made by the plaintiffs "for the purpose of communicating only with its members . . . to the exclusion of all other persons" constitute reportable expenditures subject to the contribution limits when the communications with its members are made at the request, suggestion, etc. of a candidate?

The opinion request sets forth no hypothetical factual situations to apply the law. This leaves the Board in an awkward position. The Board can restate the provisions of the law, but it has no facts, not even of a hypothetical nature, to which to apply the law. In responding to the opinion request, I have chosen not to conjure up facts for WEAC, but to provide a discussion of the law.

Review of Statutory Provisions.

WEAC bases its request on a partial statement of the provisions set out in s.11.29(1), Stats. The application of the law does not turn on whether the communications are initiated at the request or suggestion of a candidate, but on the nature of the communications to the membership. s.11.29(1), Stats., provides:

Nothing in this chapter (Chapter 11, campaign financing) restricts any corporation, cooperative or voluntary association other than a political party or a personal campaign committee from making disbursements for the purpose of communicating only with its members . . . to the exclusion of all other persons, with respect to endorsements of candidates, positions on a referendum or explanation of its views or interests, without reporting such activity. No such corporation, cooperative, or voluntary association may solicit contributions from persons who are not members . . . to be used for such purposes.

Clearly, s.11.29(1), Stats., is limited to communications with respect to endorsements of candidates or explanations of the views or interests of the organization to the membership. This communication must be funded by the organization and not some other source. The clearly detailed activity is not subject to the disclosure provisions of Chapter 11. The exempt activity permitted under the provisions of s.11.29(1), Stats., is restricted and the funding of the exempt activity is restricted. The basis for this exclusion from regulation is that the impetus for the communications arises from the organization and not an outside source. Further, the scope of the activity is limited to influencing the membership based on the organization's concerns.

The communication activity at issue is restricted only to the extent that it is eligible for the exemption from disclosure and limitation under the provisions of Chapter 11, Stats. The organization can clearly engage in activity beyond the scope of the restriction set out in s.11.29(1), Stats. However, that expanded scope will be subject to the regulations for registration, reporting and contribution limitation under the provisions of Chapter 11, Stats. If the organization engages in political activity other than that specified in s.11.29(1), Stats., the organization must register and file campaign finance disclosure reports.

Communications of a political nature which go beyond the scope articulated in s.11.29(1), Stats., would be subject to the registration and reporting requirements of Chapter 11. If the political communications are done in cooperation or consultation with, in concert with, or at the request or suggestion of a candidate, the communications will be subject to the contribution limits of Chapter 11.

The communications must be restricted to the membership to the exclusion of all others or be subject to applicable contribution limits under the requirements of Chapter 11, Stats.

Communications beyond the exclusions articulated in s.11.29(1), Stats., which are done independently of the candidate would be subject to the registration and reporting requirements set out in ss.11.05, 11.06(1)(j), (7), 11.12(6), Stats. Of course, communications to members which do not meet a political purpose test under the provisions of s.11.01(16), Stats., are not subject to regulation, including the exclusion set out in s.11.29(1), Stats.

Wisconsin law prohibits corporations and cooperatives and unregistered organizations from engaging in political activity. s.11.38(2), Stats. The exclusion of s.11.29(1), Stats., provides an exemption from those requirements.

The exclusion from disclosure of communications with respect to endorsements and an explanation of the organization's views or interests is designed to permit otherwise political communications by an organization because it does not reach out to the general public. Although the communications may be designed to influence voting, or even expressly advocate the election or defeat of clearly identified candidates, the communications are not subject to disclosure because the audience and the activity is restricted.

If a candidate requests the organization to communicate to its membership, the organization may inform its membership of candidate endorsements and an explanation of its views or interests. The views and interests of the candidate do not qualify for the exclusion from disclosure

except to the extent that the organization utilizes them in its explanation of its views and interests. To the extent that communication of the candidate's views and interests go beyond the statutory exclusion they are subject to disclosure and limitation under the applicable provisions of Chapter 11, Stats.

Conclusion.

The exclusion from campaign finance regulation provided under s.11.29, Stats., permits an organization which would be restricted under the provisions of s.11.38, Stats., to engage in certain political activity provided it meets the requirements of s.11.29, Stats.

The exclusion from registration and reporting is dependent on three factors:

1. The communication emanates from the organization to its membership to the exclusion of all others;
2. The communication consists of endorsements of candidates, *positions on a referendum or an explanation of the organizations views or interests*;
3. The communication is paid for by the organization.

Activity which does not meet this criteria does not qualify for the exclusion from registration, reporting and contribution limits established in Chapter 11, Stats. The application of other provisions of the statutes depend on the nature of the activity involved.

Because the opinion request does not specify the nature of the activity which the organization wishes to conduct,

the Board can only explain these statutory provisions. The request focuses on communications to members at the request or suggestion of a candidate. The exemption provided under s.11.29, Stats., applies only to particular types of communications. Specifically, endorsements of candidates, and explanations of the organizations views or interests. The application of the law turns on the nature of the activity rather than on whether it is initiated at the request or suggestion of the candidate.

Recommendation.

In the absence of a specific factual situation, the Board has three options:

1. The Elections Board can inform WEAC that it will not issue an opinion because there is not a sufficient factual situation to which to apply the law.
2. The Elections Board can issue the attached proposed formal opinion which essentially sets out the provisions under s.11.29(1), Stats.
3. The Board can request WEAC to supply specific factual situations and ask for the application of the law.

I recommend that the Board issue the attached draft proposed opinion subject to any modifications the Board may wish to make. Although the opinion does not address a specific factual issue, it does provide a clear statement of the law in this area. In the event the Board chooses not to issue the proposed draft formal opinion, the Board ought to inform WEAC of its reason. In my opinion, the only reason not to address the issue would be on the basis that there is not a sufficient factual situation delineated to which the Board can apply the law to

make the issuance of a formal opinion under the provisions of s.5.05(6), Stats., meaningful.

KJK:cj
[Attachment]

SEAL State of Wisconsin / ELECTIONS BOARD

132 EAST WILSON STREET
THIRD FLOOR
MADISON, WISCONSIN 53702
(608) 266-8005

Kevin J. Kennedy
Executive Director

EVAN N. ZEPPUS October 5, 1988
CHAIRMAN

Mr. Robert H. Friebert
Friebert, Finerty & St. John, S .C.
Attorneys at Law
Two Plaza East, Suite 1250
330 E. Kilbourn Ave.
Milwaukee, WI 53202-3145

Proposed
Op.El.Bd. 88-3

Dear Mr. Friebert:

You have requested the Elections Board to issue a formal opinion under the provisions of s.5.05(6), Stats., relating to the application of s.11.29(1), Stats., to communications by an organization to its membership at the request or suggestion of a candidate. Your opinion request does not describe the nature of the request or suggestion by the candidate to the organization. More importantly your request does not describe the nature of the communication to be made to the membership by the organization.

Wisconsin law clearly permits any organization to make communications to its membership. Communications of a political nature which consist of endorsements of candidates, positions on a referendum or an explanation of the organization's views or interests are not subject to the registration and reporting requirements of Chapter 11, Stats. This is provided that the communications are funded solely by the organization and the communications are limited to the members of the organization to the exclusion of all others. Section 11.29(1), Stats.

Communications of a political nature which go beyond the scope articulated in s.11.29(1), Stats., would be subject to the registration and reporting requirements of Chapter 11. If the political communications are done in cooperation or consultation with, in concert with, or at the request or suggestion of a candidate, the communications will be subject to the contribution limits of Chapter 11. The communications must be restricted to the membership to the exclusion of all others or be subject to applicable contribution limits under the requirements of Chapter 11, Stats.

Communications beyond the exclusions articulated in s.11.29(1), Stats., which are done independently of the candidate would be subject to the registration and reporting requirements set out in ss.11.05, 11.06(1)(j), (7), 11.12(6), Stats. Of course, communications to members which do not meet the political purpose test under the provisions of s.11.01(16), Stats., are not subject to regulation, including the exclusion set out in s.11.29(1), Stats.

Wisconsin law prohibits corporations and cooperatives and unregistered organizations from engaging in political

activity. s.11.38(2), Stats. The exclusions of s.11.29(1), Stats., provide an exemption from those requirements.

The exclusion from disclosure of communications with respect to endorsements and an explanation of the organization's views or interests is designed to permit otherwise political communications by an organization because it does not reach out to the general public. Although the communications may be designed to influence voting, or even expressly advocate the election or defeat of clearly identified candidates, the communications are not subject to disclosure because the audience and the activity are restricted.

If a candidate requests the organization to communicate to its membership, the organization may inform its membership of candidate endorsements and an explanation of its views or interests. The views and interests of the candidate do not qualify for the exclusion from disclosure except to the extent that the organization utilizes them in its explanation of its views and interests. To the extent that communication of the candidate's views and interests go beyond the statutory exclusion they are subject to disclosure and limitation under the applicable provisions of Chapter 11, Stats.

The exclusion from registration and reporting is dependent on three factors:

1. The communication emanates from the organization to its membership to the exclusion of all others;
2. The communication consists of endorsements of candidates, positions on a referendum or an explanation of the organizations views or interests;

3. The communication is paid for by the organization.

Activity which does not meet this criteria does not qualify for the exclusion from registration, reporting and contribution limits established in Chapter 11, Stats. The application of other provisions of the statutes depend on the nature of the activity involved.

STATE ELECTIONS BOARD

Evan N. Zeppos
Chairman

ENZ:KJK:cj

CAPTION: The exclusion set out in s.11.29(1), Stats., and the application of Wisconsin's campaign finance disclosure law is limited to communications from an organization to its members to the exclusion of all others for the purpose of communicating endorsements of candidates, positions on referenda or an explanation of the organization's views and interests. The funding of such communications must be paid for by the organization.

STATE OF WISCONSIN
ELECTIONS BOARD

[p. 1] Hearing was had before the State of Wisconsin Elections Board on October 5, 1988 in the matter of the Wisconsin Education Association. Mr. Robert H. Frieberth of Frieberth, Finerty and St. John, Milwaukee, Wisconsin, appeared on behalf of the Wisconsin Education Association.

The following proceedings were had:

THE CHAIRMAN: I don't know where to start on this. I think it doesn't matter. I would mention at the outset that Allen Lee, Assistant Attorney General from the Attorney Generals' office is here on behalf of the Board. He is the lawyer who represented us in front of Judge Moria Krueger. Welcome, Mr. Lee. I am sure you have been enlightened by our earlier discussion.

John, you suggested that you have a motion on this issue. Why don't we begin right off the bat with a motion and start the discussion?

BOARD MEMBER: I move that the Option 2 of the staff recommendation be approved and that notice similar to the draft from Kevin on page 60, a draft similar to that, be sent to Mr. Friebert and Mr. Schultz and let the chips fall where they may from there on.

THE CHAIRMAN: Before I even ask for a second, I am going to ask Kevin to explain what Option 2 does, to try to [p. 2] start to frame the discussion. Kevin is going to explain what Option number 2 is.

MR. KENNEDY: Option 2 is simply to issue the proposed opinion which is set out on pages 60 and 61, and the essence of the opinion is I think as Mr. Friebert characterized it that 11.29-1 relates to exempting from reporting otherwise political activity by a non-registrant, in this case WEAC organization political action committee, information consisting of endorsements of candidates, offers of referenda and explanations of the organization's views and interests.

The opinion specifically recognizes that in many cases the organization may be relying on what the candidate has to say. This is why we support the distribution of a piece of literature or something like that, and that opinion is just a restatement of the law on that, and I am not sure how much different it is from the position Mr. Friebert has taken. We can ask him if he is more absolute about it.

BOARD MEMBER: Can I ask a question with regard to the proposed opinion? From the third paragraph in the second sentence, political communications are done in cooperation with, in cooperation with or in concert with or at the request or suggestion of the candidate which are the subject of the contributions on page 11.

MR. KENNEDY: If they don't consist of those three areas.

BOARD MEMBER: That is not what it says, though. The [p. 3] next sentence appears to be a qualifier. Is your intent that that is what that would mean?

MR. KENNEDY: Yes. I think that is the worsely worded paragraph in the opinion.

BOARD MEMBER: My concern when we started on this whole thing, the issue was communication with a candidate. One of those would have to be attributable. My understanding is it has now shifted and that what you are saying in this is, communications with a candidate or done at the suggestion of a candidate providing they fall into the classifications you have outlined on this will not be classified as contributions, is that true?

MR. KENNEDY: That is correct.

BOARD MEMBER: That's what I read into it.

MR. KENNEDY: The problem I have, when we met in early August, was focusing in on what the particular activities were on that, and I did not feel I could bind the Board. Bob was prepared to have me sign off on some documents which he didn't show me.

That was one of the options that we presented, was if you want to rule on specific factual situations, we can do that, but we looked at the language of the statute and felt that because what you have got is a non-registrant involved in political activity there is a limit. It isn't a limit on what you can do, it's a limit on what is going to be [p. 4] reported or closed. It is not going to be regulated by Chapter 11.

WEAC itself is not a registrant, and the law clearly permits regulation of certain types of political activity and this law says that it is one that will force you to become a registrant if you engage in this activity. We won't let organizations, or we won't force organizations to become registrants if this is all they are doing, recognizing that even though this is clearly political activity, endorsements of candidates, explanations of their views and interests, why they are doing it, I am sure they are going to be very clearly and expressly advocating those views and interests. They may be saying they want you to help them, here's how you can help your candidates. I don't think there is any question that that stuff is covered in the exclusion, but we haven't gone through this.

BOARD MEMBER: Is there a motion on the floor?

THE CHAIRMAN: Yes, but there isn't a second.

BOARD MEMBER: There isn't a second. What would happen if we chose - I think this might be directed to George, and Perhaps Mr. Friebert would like to speak on this - what would happen if we chose not to issue any opinion? Would that affect the matter?

ATTORNEY: It's Mr. Friebert's case. It's sitting there. It's on appeal. It will be there tomorrow.

[p. 5] BOARD MEMBER: Is the judge's decision based on the fact that we can't issue an opinion, and that the decision was not right until we have issued an opinion? —

ATTORNEY: I think that's what she said, yes.

THE CHAIRMAN: Not that we had to issue one, but that we had to act on the question. Our opinion doesn't mean necessarily issuing one.

ATTORNEY: I think the judge's decision was basically that the complaint in front of her didn't provide facts sufficient enough for her to decide, to declare the rights to not decide the case.

ATTORNEY: I don't think the consequences of the Board not issuing an opinion would be important.

MR. KENNEDY: One of the positions we maintained all along is that we don't have any complaint against WEAC until someone files a complaint.

BOARD MEMBER: That's why I made the motion to go along with Option 2, because all Kevin is doing is defining, as he sees it, the way how the law should be interpreted, or what it means. And I think there is nothing. I think the Board can agree to that. I think that it is a

good interpretation of the statute, and therefore I thought we should go along with that, and it shouldn't affect our appealing the case one way or the other.

(At this point the WEAC proceedings were temporarily [p. 6] recessed to take up another matter.)

MR. KNEBLER: I would like to get a motion on the floor. For reasons which have been partly explained, and we are going to get into more later, I don't believe we should issue an opinion on this matter, because I don't believe we have sufficient findings of fact in the situation before us. We are asked to make practically a legal conclusion. So I move that we follow the first option set forth in our materials, namely, that we not issue an opinion.

THE CHAIRMAN: Are you making that in the form of a motion?

MR. KNEBLER: I am going to. At the time these materials were prepared, we didn't have the request from Mr. Schultz in front of us.

MR. KENNEDY: It was sent out to you with the rest of the stuff.

MR. KNEBLER: I understand, but this memorandum was prepared in the office and this Board can't inform WEAC and the Republican Party of Wisconsin that they will not issue an opinion because there is not a sufficient factual situation to which to apply the law. I so move that we so inform them.

THE CHAIRMAN: Is there a second to that motion?

BOARD MEMBER: Sure, I will second.

THE CHAIRMAN: Is there any discussion on the motion?

[p. 7] MR. KNEBLER: I believe we owe these people some discussion. Not very much. I think that it is a dangerous situation to issue and declare the rights in a situation where we do not have a specific factual context in which to apply the law. The activities of the interns, with respect to some of their activities, may be totally exempt under the statute, under Section 11.29 in particular. There may be some interns that are not following the directives they get from WEAC, and as a consequence their activities may or may not be subject to reporting.

There may be different directives than what we have seen. Those facts come out during the course of a campaign. Until those facts are there, there is no way we can say anything other than "This is what the statute says, and this is what the rules are."

Mr. Friebert has already told us he doesn't want an opinion like that. So let's follow his directives, saying we cannot do that.

We also cannot declare the statute unconstitutional or some hypothetical application of the statute unconstitutional.

I think I owe an explanation from my point of view, though, as to why this matter came up in the first place. It doesn't have anything to do with free speech matters. It came from a publication which WEAC itself put out. And here's [p. 8] what it said, May 16, 1988 publication of WEAC, monthly publication, WEAC Leader, and it says: "WEAC is currently hiring approximately 20 political

interns who will work with WEAC members for the election of pro-education candidates for the Wisconsin Legislature next November. The positions were approved by the delegates to the 1988 WEAC Representative Assembly last month in an effort to recruit and elect Wisconsin Senate and Assembly candidates."

Well, in view of I think under the statutes activities related to recruiting and electing certain candidates in most contests are under the definition of political activities and would be subject to certain reporting activities. Those are the requirements, and if there are other activities, and if there are certainly activities, there must be some that are protected by free speech, of course they wouldn't be required to be reported.

And I think I sincerely believe that we have done WEAC a big favor in getting the issue and the focus out in front so that your members and your interns and your employees don't violate the statute.

There may be no complaints that come out of this in the future, if what you have talked about here is the case. I frankly am really puzzled why you are here, or why the lawsuit was brought. I am really puzzled over that. If all your activities area exempt indeed, there is no problem.

[p. 9] So, I don't think we should issue an opinion up in the air. I don't think that's a help to anybody. I certainly don't think it's a help to either of you fellows.

THE CHAIRMAN: Maybe we should hear from Mr. Friebert.

MR. FRIEBERT: I will be extremely brief, and not loud. We believe that Exhibit E to the complaint, which is

what I believe you refer to, is an incorrect statement of the law, which we have been forced to follow because of the chilling effect.

MR. KNEBLER: I am talking about Exhibit E.

MR. FRIEBERT: I am talking about Exhibit E, which would change the conduct of the interns to avoid contact with campaigns or candidates, and either directly or indirectly. We believe we have a right to do that, but are not doing that, and will not do it, because of the activities of the Board.

(Discussion – several people talking at once.)

ATTORNEY: I don't believe the members of the Board have Exhibit E.

MR. FRIEBERT: Exhibit E is attached to the complaint, which I thought you had.

THE CHAIRMAN: Mark, you had your hand up. Did you have a question or a comment?

BOARD MEMBER: I will speak in opposition to the motion. I believe that by taking no action we provide no direction [p. 10] to WEAC. We provide no focus whatsoever to the issues on this matter. They deserve a response. I think we in fact have clouded the issue more than bringing it into focus. I think I will oppose that motion, and assuming that it will lose I will have a follow-up motion, which is not one of the recommendations on page 58.

THE CHAIRMAN: Could you just briefly inform us in general as to what your following motion might be? It might help some of us.

BOARD MEMBER: I would ask that we ask the Executive Director to issue a formal opinion that all communications of a voluntary organization such as WEAC to its members do not constitute reportable activity under our laws.

THE CHAIRMAN: Let's let Brandon respond.

MR. SCHULTZ: I would just like to add that if such a response would come from the staff to WEAC guidelines be established as to what they can and cannot do, so that this does not come up again. If you are relying on complaints to be filed after the fact, which is the point we made in our request, that doesn't necessarily solve the problem, as we have seen. But if there's guidelines that are offered as to what they can and cannot do, what is and is not political activities, what constitutes political activity as opposed to communications to its members, we are asking that to be in this ruling from the Board, the communication to WEAC.

[p. 11] BOARD MEMBER: I am troubled by the whole issue because it is up and sort of this, what if, what if. I tend to agree with John that issuing an opinion, all that the opinion would say is "Don't violate the law, which you will find on page 180 of the statutes, also refers to the rest of Chapters 5 through 12.

I don't think the opinion clarifies it. It doesn't clarify it because we don't know what we are talking about.

I am very troubled that if we give an opinion, especially given Mark's statement, we may be not looking carefully enough at Section 11.29, at least if Mark's second motion, if you were to make one, came true, because

it talks about communications among or communicating only with its members.

I think the focus of your opinion writing, and the focus of our debate, will have to be communications with a candidate and a political intern, or somebody else working on behalf of an organization.

I don't think we are talking about communications from one WEAC member to another or one WMC member to another. It's the other communications that are really troubling us, as we seem all to agree. And I am not sure we have anything yet to give an opinion about. We don't know what those communications have been. We don't know exactly how they would come up.

[p. 12] I don't think the Journal would interview someone or the editorial board would interview someone to find out their opinions or to offer an opinion as a corporate contribution when they endorsed somebody in the newspaper.

But, if there was something else going on besides talking to a candidate to get their opinion to conform to their endorsement and there was active participation by the newspaper with that candidate as to what their particular purposes are and how they can be rationalized, it would be a whole different kettle of fish.

We are not talking, apparently, about just performing an interview and seeing if they would endorse him. We are talking about WEAC members sitting down and talking with a candidate, at least if the hypothetical would seem to be positive, and just say, "How can we help

you?" And, "I will communicate with my people and we will build some sort of a Chinese law."

I am real troubled by that, and I have to know a lot more about the facts before I thought we could issue an opinion. But if we issue it, it's a nothing. I tend to agree with John that, no, we shouldn't issue a nothing opinion, and we shouldn't issue an opinion without more facts.

BOARD MEMBER: Are you troubled with this dissertation on the explanation. I mean, I seconded your motion so we got a discussion.

[p. 13] MR. KNEBLER: I don't want to discuss at this point the text of the proposed opinion, because I think that as a matter of policy we ought not issue any opinion at this time. Also, from the standpoint as a little editorial comment, I am of the opinion that our opinion basically prejudices the law. If you violate it, you are in violation. If your don't, you are not in violation.

As Mr. Friebert said, that doesn't do any good. I don't want to issue that kind of opinion, anyway. It just clutters up the record books. (couldn't hear part of this)

MR. DOHR: I have a commitment later this afternoon. We should not issue - underline *not* - issue a formal opinion because no specific fact issue is before the Board. If you accept the WEAC fact situation, it may be too expansive.

THE CHAIRMAN: I would mention at the same time, before Peter left I asked him what his voting preference on the issue would be. I asked him what his preference was procedurally. He would like to be present to vote on this issue, and based on the other issues wanted

to be here. (Couldn't hear the remainder of the chairman's remarks here.)

MR. FRIEBERT: I can give you any fact situation you want. I can give you one now. The candidate calls the intern to get people out on Saturday for a lit drop. He calls people up within the union and asks them to to volunteer and [p. 14] and they show up, in or out. I don't care. All scenarios have the same facts - candidate contact at the front, volunteers at the end, and in the middle is the intern talking to the members only. They all have the same facts. Those are the three operative facts. You can plug in any contact you want.

BOARD MEMBER: What if there are other facts?

MR. FRIEBERT: That's speculation.

BOARD MEMBER: You don't know what the interns are doing.

MR. FRIEBERT: If the intern is contacting the public in general, it is not covered, obviously.

ATTORNEY: Bob, if the opinion is limited to those particular facts you postulate, it would not do you any good.

MR. FRIEBERT: Well, you have to possibly state a reason yes or no, but it just seems to me that your discussion about being too hypothetical is not true.

You can sit and give an absolute statement that if there is contact with the public outside of the membership that that constitutes a contribution. If it is done by the request of a candidate, you can state that without knowing any more facts.

But, I can give you fact scenario after fact scenario, but all of them will have at the beginning of the pipeline candidate contact and the middle of the pipeline paid interns talking to members only, and at the end of the pipeline [p. 15] volunteer members only doing something.

BOARD MEMBER: In that exact situation I guess I would be real uncomfortable doing anything about that today, because it seems so clearly to me to be coordinated campaign activities that must be disclosed and have some sort of value put to them to the candidate's campaign.

I must be missing something, so I would like to look at it. I don't understand why they wouldn't be covered under our laws now as a campaign cost. And I must admit that there is something very big here, because everybody else seems to think maybe there isn't. And therefore, I am not at all comfortable giving that opinion today, because I guess I am missing something here.

MR. FRIEBERT: It's because of 11.29 prompted by the First Amendment, which states that this chapter doesn't restrict contacts between an organization and its members. And that's the bad part of it.

There is another section that says that individuals can contribute their work and it is not a contribution if it is volunteered. There is nothing in the exemption that says that this doesn't apply if the contact in house is prompted by a candidate. There is nothing that says that.

And I postulate to you that not just WEAC, but with most organizations, whether they support Democrats or Republicans, it is an every day event in a campaign, that

a [p. 16] candidate or a candidate's committee calls an organization for organizational help. This is a common event, and this is a blanket exclusion from that. The organization still makes the decision whether to accede to the request of the candidate. They can say no. They are not obliged to do anything. I mean, when the Republican Party calls up a corporate president and asks the corporate president to raise money, I don't think that is a reportable event, and I think it happens every day, on both sides.

MR. SCHULTZ: The difference there is, you have hired interns to do this work, and those people that are called volunteer on their own time. There is a difference between those individuals which are called to do volunteer things, whether it be me, versus the people you hire to be put into the field to do political work. There are lots of complications.

MR. FRIEBERT: I will bet you lots of those presidents do it on their own company time.

THE CHAIRMAN: The other thing I guess I would say, whether it is a company or an organization, any that I can find, there is always someone specific in an organization that has the responsibility for government affairs and legislative affairs who would do things like that. It's not the corporate executive who has got these other direct specific political responsibilities.

[p. 17] So, I do think that Bob said it differently, but I think that is the point.

MR. TURNER: I haven't heard anything that changes my opinion. (Couldn't understand the rest of his statement.)

ATTORNEY: The real issue before the Board is whether or not the Board can or should issue an opinion, and it is clear that it does no good to issue an opinion that says association of candidates with members. 11.29 says that. The Board issuing an opinion restating that will accomplish nothing.

MR. TURNER: Communication with interns.

BOARD MEMBER: Are there any interns out there working now?

MR. FRIEBERT: There sure are, but they are not engaged in this kind of contact or activity, and it is our position that we are into an election and the reason they are not doing it is because they have been chilled by this very discussion. We believe they have a right to do it. They don't have to risk prosecution to do it. They can't be forced between a rock and a hard place.

BOARD MEMBER: All candidates are chilled to a certain degree by the existence of the election laws, you know.

BOARD MEMBER: I will have to admit, I agree with Bob on that, and I know at least two other members of the Board do, and there are three that disagree. But since this matter [p. 18] has come before us in the manner it did come before us, I think it has seemed to have less than positive significance - I don't mean to use the word "chilled" - to members of that group. In connection with

that, I think that it has a serious effect on how they view their First Amendment rights.

BOARD MEMBER: I certainly thought that the idea was to communicate information. One of the purposes is to disseminate information and point out possible problem areas and so on, be helpful if possible, and that is all that was being done, as far as I could see. I think it is all a rather moot point that we are sitting here talking right now at all. Are we going to have another meeting in five days or not?

THE CHAIRMAN: There is a motion before the Board, isn't there? And there is a second on that motion. The motion is to issue no opinion.

BOARD MEMBER: Call the question.

THE CHAIRMAN: The issue before us, or the motion before us is not to issue an opinion. The question has been called.

MR. KNEBLER: I have a procedural question. If we are going to defer this matter until Peter returns, it's OK with me. If there is a majority who may vote which would count regardless of his opinion, we can not worry about having to schedule another meeting.

THE CHAIRMAN: Are you saying that if we are going to [p. 19] vote the way Peter wants us to vote, we should go ahead and vote, and if we are not, we should wait?

(Several members talking at once here.)

MR. KNEBLER: I don't know how he is going to vote on the last issue. I don't care. I think that if we are going

to - I would like to give some help to these people. I am not so sure that we can, on this matter.

The matter is in front of the court. In order to help that and the process during the term of this election, I think that we have been requested possibly to make some decision on this matter, and the trial court at least indicated that it expected that we would make some kind of decision.

I don't think the fact that one of the members is missing in a body like this, that we can put the whole process off for that. I think we have just got to try to make up our own minds.

THE CHAIRMAN: What you are saying is, we should vote.

MR. KNEBLER: We should vote.

THE CHAIRMAN: Anybody else got anything to say? Counsel, do you want to say anything?

ATTORNEY: No.

THE CHAIRMAN: The motion before the board is not to issue an opinion. It has been seconded. Discussion? Kevin will call the vote. (Tie vote) Tie vote. The motion fails.

[p. 20] BOARD MEMBER: At least, I gave Peter my word that we wouldn't take final action on this thing. I think we have got to proceed to that. At least, I have to.

(Several talking at once here)

BOARD MEMBER: I understand you want to take this up again. I would like to propose a motion.

The motion is that we direct the Executive Director to issue a formal opinion that any and all communications between a voluntary organization, such as WEAC, and its members does not constitute a reportable contribution under Chapters 5 through 12 of the statutes. Such communications include those resulting from direct or indirect candidate contact or those at the request of the candidate.

BOARD MEMBER: That is redundant.

THE CHAIRMAN: Is there any discussion on that motion? Hearing none -

BOARD MEMBER: Could we hear the motion again?

BOARD MEMBER: That we direct the Executive Director to issue a formal opinion that all communications between a voluntary organization, such as WEAC, and its members do not constitute reportable contributions under Chapters 5 through 12 of the statutes, which includes communications resulting from direct or indirect candidate contact or a communications at the request of the candidate.

BOARD MEMBER: What is a communication?

[p. 21] BOARD MEMBER: Any communication, any organization.

BOARD MEMBER: Any communication. That is the whole problem. You are trying to solve what we have been talking about this last three months. He has got the very heart of the whole issue here.

MR. KENNEDY: It's generally to draft an opinion to be issued by the Board.

BOARD MEMBER: Right, the final determination of the Board. The formal opinion will be that, based on the Wisconsin statutes, 11.29.

THE CHAIRMAN: Are you expecting that to come back to us?

BOARD MEMBER: No.

THE CHAIRMAN: You are just saying Kevin ought to draft it up and I ought to sign it.

BOARD MEMBER: That's the issue.

THE CHAIRMAN: Is there a second to that motion.

(Motion seconded)

THE CHAIRMAN: Any further discussion?

(Couldn't hear some of the discussion here.)

BOARD MEMBER: What I am talking about is a communication, so everybody understands the motion, it's communications from a voluntary, within a voluntary organization, voluntary organization to its members, whatever triggers them to make that communication, the candidate asks them to do it, it's direct or indirect contact with the candidate, any communi[p. 22]cations from a voluntary organization to its members will not constitute reportable activity.

(Statement not heard here.)

BOARD MEMBER: I am going to vote against it, for the same reasons I voted against John's motion. I looked at 11.29 (1) which says that making disbursements for the

purpose of communicating only with its members, shareholders or subscribers to the exclusion of all other purposes.

As Mr. Friebert has indicated at least five separate times, there are two levels of communication.

There is the level of communication outside the membership by the political entity, and then there is communications within the membership. I don't have any problem with the idea that communication within the membership is not subject to our scrutiny or reporting.

I have a great deal of trouble giving carte blanche to communications from outside the organization to the organization, and I am not sure but that Mark's motion may be misunderstood to give carte blanche to that kind of communication resulting without any sort of police action by this Board consistent with our statutory duty.

For that reason, I am going to vote against his motion. I will study it, and maybe I will better understand Mark's motion and see that it doesn't do that. But right now I am concerned that it might be a signal, even though we haven't [p. 23] approved the opinion, that we will.

BOARD MEMBER: That's why I indicated before that I thought it was redundant and dangerous for us to vote on it. I read the statute, I don't see the smoke. I agree with Rom, that is where the problem is. I would vote against that motion.

ATTORNEY: I think Mark's motion is not only Kevin drafting that opinion, but issuing that opinion on behalf of the Board.

BOARD MEMBER: Yes.

THE CHAIRMAN: There is a motion before the Board and it is seconded. Anyone else want to comment?

(Some discussion not heard.)

MR. FRIEBERT: This is Option 4. This is the unstated option.

MR. SCHULTZ: (Couldn't hear his statement.)

BOARD MEMBER: My comment would be that I think an opinion would simply restate the statute and we would still be left with the problem with what are communications. I think we will end up somewhere down the road then.

BOARD MEMBER: I don't agree with that. I will give you a factual situation. (Part of this not heard) WEAC calls its members, "Candidate A we are endorsing, will you put up lawn signs?" If you are interested, you can. Those people go out and do that. That is all non-reportable. The fact that WEAC, it is being paid by WEAC at the time, as long [p. 24] as the communication was to its members and they were members in the organization, that is not a reportable event. It doesn't have to be allocated for the time that is spent on that. It is not a reportable event.

I think that states it more and clearer and more detailed than what 11.29 says right on its face. I think it is consistent with an interpretation under the Federal and State constitutions, and consistent with the Federal Constitution. That's what I am saying.

I think that helps with their situation if it passes. If it doesn't pass, it also helps with their situation. They have got something helpful from the Board.

THE CHAIRMAN: Any further discussion?

BOARD MEMBER: My problem is, this is really a different subject matter. The first time that we decided this issue, there was a difference over the disclaimer on voluntary expenditures.

(Another comment not heard here.)

BOARD MEMBER: I don't disagree with that. (Further comments not clear.)

MR. FRIEBERT: If it results, you can save money right now by passing the motion. If it results in WEAC buying ads, if the contact results in WEAC buying ads -

BOARD MEMBER: Directed to the public.

MR. FRIEBERT: Directed to the public at large, that [p. 25] is in kind contribution. That is the law, and this doesn't affect that. The radio ads are done at the request of the candidate.

(some confusion here - not understood.)

MR. FRIEBERT: Whatever word you want to use. Whatever the words are, it is not independent. If WEAC does radio ads without consultation with a candidate or independent -

BOARD MEMBER: It still has to be reported.

MR. FRIEBERT: Still has to be reported. But if the expenditure that we are talking about is in house only, it

doesn't have to be reported, even if the in house expenditure is at the request of whatever prompts them to do it, the candidate asks them or how. The best case -

(Several talking at once here - not understood.)

THE CHAIRMAN: Call the question. The motion before the Board is to direct staff to draft an opinion as he so described, seconded by Mr. Turner. Mr. Kennedy will call the vote.

(Tie vote, followed by discussion as to where and when to hold the adjourned meeting.)

* * *

**EXCERPTED PORTION OF PETITIONERS' BRIEF
TO WISCONSIN SUPREME COURT**

QUESTIONS PRESENTED

In 1988, WEAC hired paid personnel (called "interns") to organize the WEAC membership in support of candidates that WEAC had endorsed for the state Senate and Assembly. Through various means, and in various respects, the Wisconsin State Elections Board significantly limited this attempt by petitioners to exercise their political rights. This is the second of two actions instituted by petitioners in an effort to enjoin the Board from chilling the exercise of those rights.

In the first action, in September, 1988, the Circuit Court Judge, Moria Krueger, held that WEAC's attempt to vindicate its statutory and constitutional rights was premature and not yet ripe for judicial review. On appeal of that decision, the Court of Appeals denied a request to expedite the appeal and several months later concluded that it had become moot.

This action concerns WEAC's second attempt to vindicate its political rights of expression and association. In this action, commenced on October 14, 1988, the Circuit Court Judge, James T. Boll, denied WEAC's request for a temporary injunction, and several months later dismissed the action on the merits.

On appeal, the Wisconsin Court of Appeals held that, even if the Board's attempts to regulate communications among WEAC members were inconsistent with the statutory law of Wisconsin and violative of both federal and state constitutional law, WEAC's attempt to vindicate its

rights in this action has become moot by virtue of the fact that the November 1988 elections had come and gone.

Accordingly, the questions presented for review are:

1. Does § 11.29, Wis. Stats., exempt from the reporting requirements and contribution limitations of the Wisconsin campaign financing laws expenses incurred for a union's internal political communications?

Not answered by the court of appeals.
Answered by the trial court: No.

2. If § 11.29, Wis. Stats., in conjunction with the rest of Chapter 11, Wis. Stats., is interpreted and applied to permit governmental interference with internal union political communications, do the Wisconsin campaign financing laws violate rights of speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution?

Not answered by the court of appeals. Not answered by the trial court.

3. To the extent that § 11.29, Wis. Stats., in conjunction with the rest of Chapter 11, Wis. Stats., is construed or interpreted to permit governmental interference with political communications among union members, is such section unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution?

Not answered by the court of appeals. Not answered by the trial court.

4. Has the passing of the November 1988 elections rendered this action moot?

Answered by the court of appeals: Yes.
Answered by the trial court: No.

5. In light of a prior court's refusal to address the merits of this action on ripeness grounds, does the court of appeals' refusal to address the merits of this action on mootness grounds constitute a violation of Article I, Section 9 of the Wisconsin Constitution, which guarantees that every person is entitled to a remedy in the laws for all injuries or wrongs that are received to person, property and character?

Not answered by the court of appeals. Not answered by the trial court.

**EXCERPTED PORTION OF PETITIONERS' BRIEF
TO WISCONSIN COURT OF APPEALS**

QUESTIONS PRESENTED

1. Does § 11.29, Wis. Stats. – and the long-standing constitutional and statutory law out of which § 11.29 emerged – exempt from the reporting requirements and contribution limitations of the Wisconsin Campaign Financing Laws expenses incurred for the intra-associational communications from WEAC interns to WEAC members at issue in this case?

The trial court answered: no.

2. Does an interpretation of § 11.29 that prohibits or restricts communications from one member to another violate rights of speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution?

The trial court declined to address the issue.

3. Is § 11.29, Wis. Stats., which exempts from the reporting requirements and contribution limitations of the Wisconsin Campaign Financing Laws expenses incurred by a voluntary association for the purposes of communicating only with its members "with respect to endorsements of candidates . . . or explanation of its views of interests," unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution?

The trial court declined to address the issue.

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

U.S. Const. amend XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

§ 11.01(6)(a):

Definitions. As used in this chapter:

. . . "Contribution" means:

1. A gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business), made for political purposes. In this subdivision "anything of value" means a thing of merchantable value.

2. A transfer of personalty, including but not limited to campaign materials and supplies, valued at the replacement cost at the time of transfer.

3. A contract, promise or agreement, if legally enforceable, to make a gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a commercial lending institution in accordance with applicable laws and regulations in the ordinary course of business) for a political purpose.
4. A transfer of funds between candidates, committees, individuals or groups subject to a filing requirement under this chapter.
5. The purchase of a ticket for a meal, rally or other fund-raising event for a purpose under subd. 1, whether or not actually utilized.
6. The distribution of any publication or advertising matter for any purpose under subd. 1 other than by a registrant under s. 11.05, or as provided in s. 11.29.
7. A gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the ordinary course of business), or a contract, promise or agreement, if legally enforceable, to make the same, made by a committee for a purpose authorized under s. 11.25(2)(b), or by an individual for a purpose authorized under s. 11.25(2)(b) if deposited in a campaign depository account. . . .

§ 11.26(2)(b) and (c):

Limitations on Contributions.

. . . (2) No committee other than a political party committee or legislative campaign committee may make any contribution or contributions to a candidate for election or nomination to any of the following offices and to any individual or

committee under s. 11.06(7) acting solely in support of such a candidate or solely in opposition to the candidate's opponent to the extent of more than a total of the amounts specified per candidate:

. . . (b) Candidates for state senator, \$1,000.

(c) Candidates for representative to the assembly, \$500. . . .

§ 11.29(1):

Communications for political purposes.

(1) Nothing in this chapter restricts any corporation, cooperative or voluntary association other than a political party or personal campaign committee from making disbursements for the purpose of communicating only with its members, shareholders or subscribers to the exclusion of all other persons, with respect to endorsements of candidates, positions on a referendum or explanation of its views or interests, without reporting such activity. No such corporation, cooperative or voluntary association may solicit contributions from persons who are not members, shareholders or subscribers to be used for such purposes. . . .



(2)
No. 90-492

Supreme Court, U.S.
FILED

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

WISCONSIN EDUCATION ASSOCIATION
COUNCIL and WEAC-PAC,

Petitioners,

v.

THE WISCONSIN STATE ELECTIONS
BOARD, PETER DOHR, FREDERIC MOHS,
DON MOECKER, THOMAS GODAR, MARK
SOSTARICH, ROBERT TURNER, JOHN
NIEBLER, EVAN ZEPPOS, KEVIN KENNEDY
and THEIR OFFICERS, AGENTS, SERVANTS,
and EMPLOYEES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

RESPONDENTS' BRIEF IN OPPOSITION

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October, 1990

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether sec. 11.29(1), Wis. Stats., which exempts from Wisconsin's Campaign Finance Act a corporation's or union's communicating of its political views to its shareholders or members also exempts communications and activities which otherwise would be considered political contributions or disbursements.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
REASONS WHY THE PETITION SHOULD BE DENIED .	1
I. NONE OF THE COURTS BELOW REACHED THE CONSTITUTIONAL QUESTIONS BECAUSE OF THE CONTINGENT NATURE OF THE FACTS.	1
II. THIS COURT HAS ALREADY DECIDED THE CONSTITUTIONAL ISSUES. . . .	4
CONCLUSION	11

CASES CITED

Buckley v. Valeo, 424 U.S. 1 (1976)	5, 6, 7, 11
United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948)	6, 10

STATUTES AND RULES CITED

Ch. 11	7
Sec. 11.06(7m)	5
11.29	3, 4, 7
11.29(1)	1, 6

OTHER AUTHORITIES

2 U.S.C. §

431(7)(B)(vi)	8
441a(a)(7)(B)(i)	5
441a(a)(7)(B)(ii)	5
441(b)(b)(2)(A)	8

11 C.F.R. §

100.7(a)(3)	8
114.12(c)(1)	8-9
114.3	10
114.3(c)(1)(ii)	10

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REASONS WHY THE PETITION
SHOULD BE DENIED

- I. NONE OF THE COURTS BELOW
REACHED THE CONSTITUTIONAL
QUESTIONS BECAUSE OF THE
CONTINGENT NATURE OF THE FACTS.

The petitioners have asked two state
circuit courts, twice asked the state court of

appeals, and then asked the Wisconsin Supreme Court to rule on the issue which it now presents to this court. The Wisconsin Supreme Court refused to reach the constitutional claims, because the facts were "contingent and uncertain" (P-Ap. 11). The circuit court declined to "address a constitutional attack and embark on a constitutional analysis when it cannot result in a determination of how any such finding would impact on plaintiffs" (P-Ap. 27-28). The first circuit court to address the issue found "[t]here is no other way to characterize the facts offered by plaintiffs than as 'contingent'" (P-Ap. 69). The Elections Board reluctantly issued an opinion even though "[y]our opinion request does not describe the nature of the request or suggestion by the candidate to the organization. More importantly your request does not describe the nature of the communication to be made to the membership by the organization" (P-Ap. 29).

The petitioner's challenge has always been that sec. 11.29, Wis. Stats., is unconstitutional as applied to their intern program (P-Ap. 53), but the statute has never been applied to WEAC (P-Ap. 11) and WEAC "has refused to specify the nature and scope of the communications which will occur between its members and the interns." Id. Because of the petitioners' persistent failure to supply the necessary facts, the courts reviewing this case have been unable to reach the constitutional claims, have had to dismiss the case as not appropriate for declaratory judgement, or, in the case of the Wisconsin Supreme Court and the Elections Board, have been able to give only a summary of the applicable law. This court, therefore, does not have the benefit of lower court findings of fact, since no facts were ever presented to the lower courts. The petitioners are asking this court to venture where other courts have refused to tread, are asking this court to

issue an advisory opinion when other courts have refused to do so.

The petitioners' formulation of the first Question Presented misstates the issue. The statute does not limit political communication. The statute exempts certain communications from the reporting requirements and contribution limitations of Wisconsin's Campaign Finance Act. The courts presented with this case simply have held that it is impossible to determine whether a particular activity is a contribution or a disbursement without specific facts. The petitioners have persistently refused to provide those facts.

II. THIS COURT HAS ALREADY DECIDED THE CONSTITUTIONAL ISSUES.

Section 11.29 is part of Wisconsin's Campaign Finance Act. That law, like its federal counterpart, requires that political disbursements be reported and places limitations on political contributions. In

the federal act, contributions include expenditures made by any person in "cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" and "the financing by any person of dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, its campaign committees, or their authorized agents." 2 U.S.C. § 441a(a)(7)(B)(i) and (ii). Wisconsin law parallels the federal law, providing that a committee which "does not act in concert with, or at the request or suggestion of," a candidate need not report expenditures as contributions to that candidate. Sec. 11.06(7m), Wis. Stats.

In Buckley v. Valeo, 424 U.S. 1 (1976), this court held that contribution limitations and reporting requirements do not

impermissibly restrict either the contributor's freedom of political association or other first amendment rights. The court specifically noted that "[e]xpenditures by persons and associations that are 'authorized or requested' by the candidate or his agents are treated as contributions under the Act." Buckley, 424 U.S. at 24 n.25.

In United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948), this court held that the Labor-Management Relations Act of 1947 could not constitutionally restrict corporations and unions from advising their members, stockholders, or customers on political matters in the regular course of conducting their affairs. U.S. v. C.I.O., 335 U.S. at 121. Section 11.29(1) codifies U.S. v. C.I.O. That case does not stand for the proposition that union or corporation communications with members or stockholders can never be considered political contributions or

political disbursements. That was not the issue in the case. That issue, however, was decided in Buckley, and the clear answer is that the government can require the reporting of actual political contributions and disbursements. That is all that Wisconsin is doing.

The petitioners wish to use the exemption in sec. 11.29 to immunize any transaction from regulation as a contribution under any other provision of ch. 11 (P-Ap. 8). The statute does not provide that immunity. The constitution does not require that immunity.

It is clear that regulation of political activities is permissible. The two separate questions of what is political activity and whether any particular political activity is regulated depends on particular facts. Both the state and federal campaign finance laws exempt certain communications from a union to its members. But a review of even the detailed federal regulations shows that not

all such communications are exempt and illustrates the difference between a mere internal communication and a contribution to a campaign.

The Federal Election Campaign Act excludes from the definition of contribution "communications . . . by a labor organization to its members and their families on any subject." 2 U.S.C. §§ 431(7)(B)(vi) and 441b(b)(2)(A). 11 C.F.R. § 100.7(a)(3) provides: "[t]he payment by any person of compensation for the personal services of another person if those services are rendered without charge to a political committee for any purpose, except for legal and accounting services provided under 11 C.F.R. 100.7(b)(13) or (14), is a contribution." 11 C.F.R. § 114.12(c)(1) provides that a corporation or labor organization may not pay the employer's share of the cost of fringe benefits, such as health and life insurance and retirement for employees or members on leave-without-pay to

participate in political campaigns. The law then provides "[t]he separate segregated fund of a corporation or a labor organization may pay the employer's share of fringe benefits, and such payment would be a contribution in-kind to the candidate."

The federal law, like Wisconsin's, is an attempt to require full disclosure of campaign contributions and the sources of those contributions. Neither the federal law nor the state law limits a corporation's or a union's right to communicate with its members. Both laws, however, provide that when the services of an employee are provided to a campaign, those services must be reported as contributions to that campaign. "Communications" to members are exempt. The provision of services to a campaign to make those communications possible, to solicit volunteers or money on behalf of the campaign, are not exempt under either federal or state law.

11 C.F.R. § 114.3 lists disbursements which corporations and labor organizations may make to its members. One of the provisions of that law is that any material used in making partisan communications must constitute "a communication of the views of the corporation or the labor organization . . . not the republication or reproduction in whole or in part, of any broadcast, transcript, or tape or any written, graphic, or other form of campaign materials prepared by the candidate, his or her campaign committees, or their authorized agents." 11 C.F.R. § 114.3(c) (1)(ii). The issue, under both federal and state law, is whether the communication or solicitation is the organization's communication or the candidate's communication. That will always be an issue of fact that must be decided on a case-by-case basis.

Wisconsin's law does nothing more than codify this court's decision in U.S. v. C.I.O. The rest of Wisconsin's Campaign Finance Act

reflects this court's decision in Buckley. Both the Campaign Finance Act and the exception are constitutional.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The
Supreme Court Of Wisconsin

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The respondents argue that the facts in the record are too contingent to justify the issuance of a writ of certiorari. For the purpose of deciding the federal constitutional issues in WEAC's petition for a writ of certiorari, there is only one constitutionally relevant fact which is

undisputed: the WEAC interns were to make political communications *solely* to WEAC members.

In its interpretation of § 11.29(1), Wis. Stats., the Wisconsin Supreme Court agreed with the respondents' position that such communications could be outside the exemption of the statute, and accepted the respondents' position that WEAC had to specify the nature and scope of its communications with the membership before it could decide the federal constitutional issues (App. 9-11). It is precisely this interpretation requiring inquiry into the content of the communications and permitting limitations on the union's political communications with its own members that is inconsistent with decisions of the Court. *United States v. C.I.O.*, 335 U.S. 106 (1948). The "contingent facts" argued by the respondents are the nature of these internal union communications. These facts are constitutionally irrelevant.

The respondents incorrectly describe the holdings of both *United States v. C.I.O.*, *supra*, and *Buckley v. Valeo*, 424 U.S. 1 (1976). The respondents argue C.I.O. does not stand for the proposition that union communications with its members can never be considered political contributions or disbursements. *Brief in Opposition*, 6-7. If the respondents mean to suggest C.I.O. permits limitations on the expenses incurred in making such communications, WEAC asserts just the opposite. Under C.I.O., Wisconsin cannot put limits on a union's ability to make political communications to its members. The respondents also argue incorrectly that *Buckley* permitted such limitations. No issue concerning the internal communications of a corporation, union or other association was decided in *Buckley*.

Finally, the respondents have made no effort to address the vagueness issue under the First and Fourteenth Amendments.

CONCLUSION

For the reasons stated above and in WEAC's original petition, a writ of certiorari should issue to review the decision and order of the Wisconsin Supreme Court.

Respectfully submitted,

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